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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 140.

LAMBERT N. HOPKINS, THOMAS B. CATRON AND WILLIAM T. THORNTON, PLAINTIFFS IN ERROR,

vs.

WILLIAM C. ORR, AND De COURSEY B. LINDSLEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 LAMBERT N. HOPKINS, THOMAS B. CATRON, and WILLIAM T. THORNTON, Plaintiffs in Error,

vs.

WILLIAM C. ORR and DE COURCEY B. LINDSLEY, Defendants in Error.

Supreme Court, Territory of New Mexico.

WILLIAM C. ORR and DE COURCEY B. LINDSLEY, Appellees,

versus

LAMBERT N. HOPKINS, Appellant.

Be it remembered that heretofore, to wit, on the twenty-third day of December, 1884, there was filed in the clerk's office of the supreme court of the Territory of New Mexico the following transcript of the records of the district court of the second judicial district of said Territory within and for the county of Bernalillo in the above-entitled cause; which said transcript was and is in the words and figures following, to wit:

2 *Appeal from the Second Judicial District, Bernalillo County.*

In the Supreme Court of the Territory of New Mexico, at the January, 1883, Term.

WILLIAM C. ORR and DE COURSEY B. LINDSLEY, Appellees, *versus* LAMBERT N. HOPKINS, Appellant. } Number 154.

Assumpsit.

Appeal allowed June 22, 1882.

McComas and Catron and Thornton, attorneys for defendant and appellant; Conway and Childers, attorneys for plaintiff- & appellees.

3 & 4 Be it remembered that on the 3d day of April, A. D. 1882, William C. Orr and De Courcey B. Lindsley, composing the firm of Orr and Lindsley, filed their declaration in assumpsit against Lambert N. Hopkins in the office of the clerk of the second judicial district court of the Territory of New Mexico for the county of Valencia; which declaration is in the words and figures following, viz:

Declaration.

TERRITORY OF NEW MEXICO, *County of Valencia.* } *ss:*

In the District Court of the Second Judicial District, Sitting in the County of Valencia, Territory of New Mexico, for the Trial of Causes Arising under the Laws of the Territory, at the March Term, A. D. 1882.

To the Hon. Joseph Bell, assc. justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioners, William C. Orr & De Courcey B. Lindsley, resi-

dents of the city of Saint Louis, in the State of Missouri, and partners doing business under the firm name of Orr and Lindsey, complain of Lambert N. Hopkins, a resident of the county of Valencia, in the Territory of New Mexico, in an action of assumpsit—

For that whereas the said defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred & eighty-one, at, to wit, the city of Saint Louis, Missouri—that is to say, at, to wit, the county of Valencia aforesaid, written St. Louis, made his certain promissory note in writing, bearing
5 date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay four months after the date thereof to the order of said plaintiffs the sum of thirteen hundred and fourteen and $\frac{65}{100}$ dollars, for value received, with interest at the rate of ten per cent. per annum from maturity, and then and there delivered the said promissory note to the said plaintiffs, by means whereof and by force of the statute in such case made and provided the said defendants then and there became liable to pay to said plaintiffs the said sum of money in the said promissory note; and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county of Valencia aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay to them the said sum of money in the promissory note specified, according to the tenor and effect thereof.

For that whereas the said *the said* defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred & eighty-one, at, to wit, the county of Valencia, in the Territory of New Mexico, was justly indebted to the said plaintiffs in the sum of thirteen hundred and fourteen and $\frac{65}{100}$ dollars, lawful money of the United States of America, for divers goods, wares, & merchandise by the said plaintiffs before that time sold and delivered to the said defendant, at *the* special instance and request;
6 and also in the further sum of fourteen hundred and fourteen $\frac{65}{100}$ dollars, of like lawful money, for money by the said plaintiffs before that time lent and advanced to and paid, laid out, and expended for the said defendant and at his like special instance and request; and also in the further sum of thirteen hundred & fourteen and $\frac{60}{100}$ —, of like lawful money, for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county of Valencia aforesaid, undertook and then and there faithfufly promised the said plaintiffs to pay them the said several sums of money in this count mentioned when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Valencia aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money from the said defendant to the said plaintiffs before that time due and owing and then in arrears and unpaid, and upon such accounting the defendant was then and there found to be in arrears

and indebted to said plaintiff in the further sum of thirteen hundred and fourteen and $\frac{65}{100}$ dollars, of like lawful money; and, being so found in arrears and indebted, he, the said defendant, in consideration thereof, afterwards, to wit, the day and year last aforesaid, at, to wit, the county of Valencia aforesaid, undertook and then
7 and there faithfully promised the said plaintiffs to pay them the last-named sum of money when he, the said defendant, should be thereunto afterwards requested:

Yet the said defendants, not regarding his said several promises and undertaking, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiffs, although often requested so to do; but the said defendant to pay them the same hitherto wholly neglected and refused, and so still doth neglect and refuse, to the damage of the said plaintiffs in the sum of two thousand dollars.

Plaintiffs therefore bring suit and ask judgment of this honorable court for said sum of two thousand dollars, together with interest and costs of suit.

(S'g'd) CONWAY, RISQUE AND CHILDERS,
Attorneys for Plaintiffs.

8 And thereafter and on the same day last aforesaid the said plaintiffs, by their attorneys, filed in this office of said clerk a paper, endorsed Exhibit A, in the words and figures following, to wit:

EXHIBIT A.

$1,314.65. ST. LOUIS, *October 1st*, 1881.

Four months after date I, the subscriber, of Ft. Wingate, county of ——, State of New Mexico, promise to pay to the order of Orr and Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred and fourteen $\frac{65}{100}$ dollars, with exchange, for value received, with interest at the rate of ten per cent. per annum after maturity until paid, without defalcation or discount, negotiable and payable at 1st National Bank, Santa Fé, N. M.

L. N. HOPKINS, JR.

And thereafter and on the 23th day of April, 1882, there were filed in the office of the clerk of said district court in and for the county of Bernalillo the said declaration and Exhibit A, above set forth, together with a transcript of the proceedings and journal entries in this case in the said county of Valencia; which said transcript is in the words and figures following, to wit:

9 *Transcript of Change of Venue.*

TERRITORY OF NEW MEXICO, } ss:
County of Valencia, }

At a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held at the court-house, in the county of Valencia, on the second Monday after the

fourth Monday of March, being the 10th day of April, A. D. 1882 on the fourth day thereof, the following, among other, proceedings were had, to wit:

Appearance.

WM. C. ORR *et al. vs.* L. N. HOPKINS.

Assumpsit.

Now comes the said defendant, by his attorneys, McComas and Catron and Thornton, and enters his appearance herein.

And afterwards, to wit, on the 5th day of said term, among others, the following proceedings were had, to wit:

Order Changing Venue.

WILLIAM C. ORR *et al. vs.* L. N. HOPKINS.

Assumpsit.

By consent of the parties to this suit it is ordered that the venue of this cause be, and the same is hereby, changed from this county to the county of Bernalillo, and that the clerk of this court transmit to the clerk of the district court for said county of Bernalillo a full and complete transcript of the journal entries had in this cause in this court, together with all original papers on file herein, and that this cause be docketed for the May term of the district court within and for said county of Bernalillo.

TERRITORY OF NEW MEXICO, } *ss:*
Valencia County, }

I, Karl A. Snyder, clerk of the second judicial district of said Territory, do certify the foregoing to be a full and complete transcript of the journal entries and proceedings had in a certain cause lately pending in said county, wherein William C. Orr and others are plaintiffs and Lambert N. Hopkins is defendant.

Witness my hand and the seal of said court this 14th day of April, A. D. 1882.

[SEAL.] (S'g'd) KARL A. SNYDER, *Clerk.*

And afterwards, to wit, on the 14th day of May, A. D. 1882, the said defendant, by his attorneys, McComas and Catron and Thornton, filed in the office of the clerk of said district court in and for the county of Bernalillo, his plea, which plea is in the words following, to wit:

Pleas.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

In the District Court, of the May Term, A. D. 1882.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

In Assumpsit.

11 *First Plea.*

And the defendant, by McComas and Catron and Thornton, his attorneys, comes and defends the wrong and inquiry when, etc., and says that he did not undertake and promis-, in manner and form as the plaintiff- *has* in *his* declaration thereof complained against him, and of this he puts himself upon the country.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
His Attorneys.

Joinder.

On which plea the said plaintiffs, by their attorneys, thereupon joined issue in the words following, to wit:

And the said plaintiffs do the like.

(S'g'd) CONWAY AND CHILDERS,
Attorneys for Plaintiffs.

Second Plea.

And for further — in this behalf defendant says *actio non*, because he says that after the making of the promises in said several counts of said declaration mentioned and before the commencement of this suit, to wit, on the first day of April, A. D. 1882, the defendant paid to the plaintiff- divers sums of good an- lawful money of the United States, amounting, to wit, to all the money in the said counts in said declaration mentioned, in full satisfaction and discharge of all causes and rights of action mentioned in said declaration, which payment the plaintiff- did then accept of and from the defendant in such
12 full satisfaction and discharge as aforesaid, and this the defendant is ready to verify. Wherefore he prays judgment.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Attorneys for Defendant.

And afterwards, to wit, on the 11th day of May, 1882, the plaintiffs, by their attorneys, Conway and Childers, filed in said clerk's office a replication to the second plea of the said defendants, which replication is in the words following, to wit:

TERRITORY OF NEW MEXICO, *County of Bernalillo*:

In the District Court, Second Judicial District, County of Bernalillo.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

And the plaintiffs, as to the plea of the defendants, by him (secondly) above pleaded, says that they, the said plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having their aforesaid action, because they say that the defendant did not pay to the plaintiffs the moneys in the said second plea in that behalf mentioned in full satisfaction and discharge of the said several promises and sums of money in the said declaration mentioned in manner and form as the defendant has above in that plea alleged, and of this the plaintiffs put themselves upon the country, &c.

(S'g'd) CONWAY AND CHILDERS,
Attorneys for Plaintiff-.

13 And afterwards, to wit, at a regular term of the district court of the second judical district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, in said district, on the first Monday in May, in the year one thousand eight hundred and eighty-two, being the first day of May, A. D. 1882, and on the twentieth day of said term, the same being Tuesday, the 23rd day of May, 1882, the following, among other, proceedings were had, to wit:

Trial. Verdict. Judgment.

WILLIAM C. ORR *et al.*
vs. } 595.
LAMBERT N. HOPKINS.

Assumpsit.

And now comes the plaintiffs, by their attorneys, Conway and Childers, and the said defendant, by his attorneys, McComas and Catron and Thornton, and, issue being joined between the parties, thereupon comes a jury, to wit, Bernardo Vigil, Jesus Caudelario, Juan De Dios Baca, Julian Servantes, Felipe Garcia, A. M. Coddington, Jose de la Cruz Baca, Guy Bennett, Jose B. Garcia, J. Edward Priest, C. B. Hawley, Pedro Rivali, twelve good and lawful men chosen from the body of the second judicial district of the Territory of New Mexico, who, having been duly sworn the truth to speak upon the issue joined between the parties after hearing the evidence and instructions of the court,

14 say that they find for the plaintiff- in sum of thirteen hundred and ninety-nine and $\frac{48}{100}$ —. It is therefore considered by the court that the said plaintiffs do have and recover from the said defendant, Lambert N. Hopkins, the said sum of thirteen hundred and ninety-nine and $\frac{48}{100}$ — ($1,399.48), and also his costs in their behalf laid out and expended, to be taxed, but that execution shall not issue therefor until further orders of the court.

And afterwards, to wit, on the 24th day of May, A. D. 1882, the defendant, by his attorneys, McComas and Catron and Thornton, filed in the office of said clerk a motion in arrest of judgment and a motion for a new trial; which said motions are, respectively, in words and figures as follows, to wit:

Motion For New Trial.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, of the May Term, A. D. 1882.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit.

And now comes Lambert N. Hopkins, the above-named defendant, by his attorney-, McComas and Catron and Thornton, and moves the court here to set aside the verdict and grant him a new trial in said cause, and alleges and sets forth the following grounds therefor:

1st. Because improper, incompetent, and inadmissible evidence was permit-ed by the court to go — the jury.

2nd. Because of a fatal variance between the note sued on and the note introduced in evidence by plaintiff-.

15 3rd. Because the note introduced in evidence was wholly incompetent and improper as evidence for any purpose and did not sustain plaintiffs' declaration.

4th. Because the court admitted said note in evidence without regard to the variance aforesaid.

5th. Because there was nothing at the trial of said cause or in the files thereof to show that the note offered in evidence was the same note sued on by plaintiff-.

6th. Because neither the original nor a copy of the note declared on by plaintiff- was attached to or filed with their declaration in said cause nor any reason whatever given why the same was not filed.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Attorneys for Defendant.

Motion in Arrest of Judgment.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo }

In the District Court, of the May Term, A. D. 1882.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit.

And now comes Lambert N. Hopkins, the above-named defendant, by his attorneys, McComas and Catron and Thornton, and moves the court here to arrest judgment in said cause against said

defendant, and alleges and sets forth the following grounds therefore:

1st. Because improper, incompetent, and inadmissible evidence was permitted by the court to go — the jury.

2nd. Because of a fatal variance between the note declared on and the note introduced in evidence.

16 3rd. Because the note introduced in evidence was wholly incompetent and improper as evidence for any purpose and did not sustain plaintiffs' declaration.

4th. Because the court admitted said note in evidence without regard to the variance aforesaid.

5th. Because there was nothing at the trial of said cause to show that the note offered in evidence was the same note sued on by plaintiff-.

6th. Because neither the original nor a copy of the note declared on by plaintiffs was attached to or filed with their declaration nor any *any* reason whatever given why the same was not filed.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Att'ys for Def't.

And afterwards, to wit, on the 27th day of May, A. D. 1882, the parties to this action, by their respective attorneys, filed in the office of said clerk a stipulation, which stipulation is in the words and figures following, to wit:

Stipulation.

TERRITORY OF NEW MEXICO, } *ss:*
County of Bernalillo, }

In the District Court, of the May Term, A. D. 1882.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit.

And now come the parties plaintiff and defendant in the above-entitled cause, by their respective attorneys, Conway and Childers, for plaintiff-, and McComas and Catron and Thornton, for defendants, and it is expressly stipulated and agreed by and be-

17 tween the said parties that in the matter of the application of the said defendants for an arrest of judgment and for a new trial in said cause heretofore made and argued in open court at the present term thereof the judges of said court may consider and pass upon the said application for arrest of judgment and a new trial, respectively, in vacation, and that the decision of the said judges of the applications aforesaid shall be held and taken by the said parties and their attorneys to be made at and of the said May term of court, A. D. 1882, and that in case the said judge in vacation aforesaid shall deny the applications of the defendant aforesaid, then the said defendant may appeal or sue out a writ of error to the Supreme Court from the judgment rendered in said cause if the said defend-

ant shall so desire, and that all the steps necessary to be taken in perfecting said appeal or writ of error which are now by law required to be done and taken in open court during the present term thereof shall be held and taken by the said parties and their attorneys to be in apt time and at and of the said May term of court, A. D. 1882, as if done at said term of court and shall have the same force and effect, and that in case the said judge in vacation should sustain the application of defendant and set aside the judgment and grant a new trial of said cause all his acts in said premises shall be taken and held to be at and of the said May term of court, A. D. 1882, and shall have the same force and effect as if done in open court at said term of court, but executions shall not be
18 stayed should the said court overrule said motion, except upon filing the bond required by law for a supersedeas.

Done and subscribed this 27th day of May, A. D. 1882.

(S'g'd) CONWAY AND CHILDERS,
Attorneys for Plaintiffs.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Att'ys for Defendant.

And thereafter and on the 15th day of June, 1882, the foregoing motions in arrest of judgment and for a new trial were denied by the court at chambers with leave for executions to issue.

And afterwards, to wit, on the 22nd day of June, A. D. 1882, the said defendant, by his attorneys, McComas and Catron and Thornton, filed in the office of the said clerk a motion, affidavit, and bond for an appeal to the supreme court in the words and figures following, to wit:

Motion for Appeal.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, of the May Term, A. D. 1882.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit.

And now comes the above-named defendant, Lambert N. Hopkins, by his attorneys, McComas and Catron and Thornton, and prays the court here to grant him an appeal from the judgment of
19 said court in the above-entitled cause to the supreme court of this Territory, and that a writ of supersedeas be granted staying and suspending al- furthur proceedings in said cause, and on the judgment therein rendered until the said cause shall be finally determined in the supreme court of said Territory.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Att'ys for Defendants.

Affidavit for Appeal.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, of the May Term, A. D. 1884.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit.

And now comes C. C. McComas, the authorized agent of Lambert N. Hopkins, the defendant in the above-entitled cause, who, being first duly sworn, on oath says that the appeal applied for and taken in said cause to the supreme court of this Territory is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of this court.

(S'g'd) C. C. McCOMAS.

Subscribed and sworn to before me this 22nd day of June, A. D. 1882.

[SEAL.] (S'g'd) EDMUND H. SMITH, *Clerk.*

Appeal Bond.

Know all men by these present- that we, Lambert N. Hop-
20 kins, as principal, and W. T. Thornton and T. B. Catron *are* securities, are held and firmly bound unto Orr and Lindsley in the penal sum of twenty-eight hundred dollars, lawful money of the United States of America; to the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our joint heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of June, A. D. 1882.

The condition of the above obligation is such that whereas the above-bounded Lambert N. Hopkins has appealed to the supreme court of the Territory of New Mexico from the judgment and decision of the district court of the 2nd judicial — in and for the county of Bernalillo, in said Territory, in the case of William C. Orr and De Courcey B. Lindsley, partners, doing business under the firm name of Orr and Lindsley, *vs.* Lambert N. Hopkins, tried and determined at the May term, A. D. 1882, of said court: Now, if the said Lambert N. Hopkins shall prosecute his said appeal with due diligence to a decision in the supreme court, and that if the judgment appealed from be affirmed or the appeal be dismissed that he will perform the judgment of the district court, and that he will also pay the cost and damage that may be adjudged against him upon his said appeal, then this obligation to be null and void; otherwise to remain in full force and effect.

(S'g'd) LAMBERT N. HOPKINS. [SEAL.]
W. T. THORNTON. [SEAL.]
T. B. CATRON. [SEAL.]

21 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

On the 21st day of June, 1882, personally appeared before me, the undersigned, W. T. Thornton and T. B. Catron, whose names are signed to the foregoing bond, both personally well known to me, and acknowledged that they had executed said bond freely and voluntarily for the purposes therein set forth, and the said W. T. Thornton and T. B. Catron, being each duly sworn according to law, each deposes and says that he is worth the sum of twenty-eight hundred dollars over and above his just debts and liabilities and the amount by law exempt from execution.

Witness my hand and the seal of the first judicial district court of said Territory this 21st day of June, A. D. 1882.

[SEAL.] (S'g'd) F. W. CLANCY, *Clerk.*

Approved and taken this 22nd day of June, 1882.

EDMUND A. SMITH,
Clerk 2nd District.

And thereafter, and on the 22nd day of June, 1882, the following order was duly made by the judge of said district court in the words and — following, to wit:

Order Allowing Appeal.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

The defendant having filed an appeal to the Supreme Court from the judgment entered herein in favor of the plaintiffs and
22 against the said defendants, and having given bond required by law, the said appeal is hereby allowed and proceedings upon said judgment by execution are stayed pending the said appeal.

And afterwards, to wit, on the 22nd day of June, 1882, the parties to this suit, by their respective attorneys, filed in the office of said clerk a stipulation in the following words, to wit:

Stipulation.

TERRITORY OF NEW MEXICO, *County of Bernalillo:*

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

Assumpsit. Appealed to the supreme court.

It is hereby — by and between the parties plaintiffs and defendants in the above-entitled cause and their respective attorneys that the appellant, the said Lambert N. Hopkins, shall have — to the 1st day of August, 1882, inclusive, in which to make and file his bill of exceptions in his appeal to the supreme court of said cause.

(S'g'd) CONWAY AND CHILDERS,
Attorneys for Plaintiffs.

(S'g'd) McCOMAS AND CATRON AND THORNTON,
Attorneys for Defendant.

And thereafter, on the 16 day of November, A. D. 1882, the said defendant, Lambert N. Hopkins, by his attorneys, filed in the office of the clerk of said district court his bill of exceptions herein, which said bill of exceptions is in the words and figures following, to wit:

23 *Bill of Exceptions.*

In the District Court of the 2nd Judicial District in and for the County of Bernalillo and Territory of New Mexico, for the Trial of Causes, &c., of the May Term, A. D. 1882.

WILLIAM C. ORR *et al.*
vs.
LAMBERT N. HOPKINS. } No. 595.

In Assumpsit.

Be it remembered that at the trial of the above-entitled cause in said court at said term the following proceedings were had, to wit:

The said plaintiffs, to maintain the issue upon their part at the trial of said cause, offered and gave in evidence on their behalf the following instruments of writing, purporting to be a promissory note—that is to say:

$1,314.65. ST. LOUIS, *October 1st*, 1881.

Four months after date I, the subscriber, of Ft. Wingate, county of —— and State of New Mexico, promise to pay to the order of Orr and Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred & fourteen $\frac{65}{100}$ dollars, with exchange, for value received, with interest at the rate of ten per cent. per annum after maturity until paid, without defalcation or discount, negotiable and payable at 1st National Bank, Santa Fé, N. M.

"L. N. HOPKINS, JR."

To the offering and giving in evidence of which said instrument of writing the defendant, by his counsel, then and there objected for the reason that the same was not the note sued on and was wholly variant therefrom, and was otherwise improper and incom-
24 petent as evidence and did not sustain plaintiffs' declaration, and there was nothing at the trial of said cause or in the files thereof to show that the note offered in evidence was the note sued on by plaintiffs; but the court overruled the objection and permitted said instrument of writing to be read in evidence to the jury; to which ruling and decision of the court *and* permitting said instrument of writing to be read in evidence defendant, by his counsel, then and there excepted; and plaintiffs further gave in evidence on their behalf—that is to say, W. B. Childers, being duly sworn, testified:

Gentlemen of the jury, I state under my oath to you that on or about the 7th day of March of this year I went to F. T. Wingate for the purpose of seeing the defendant in this cause, Lambert N. Hopkins, in regard to the note sued on and the collection of the debt, of which it is the evidence.

To which statement of the witness defendant, by his counsel, then and there objected for the reason that the witness was but stating his opinion and conclusions, and said evidence was otherwise incompetent and improper, but the court overruled the objection and permitted the same to go to the jury; to which ruling and decision of the court defendant, by his counsel, then and there excepted.

The witness further proceeded as follows: I presented this note to L. N. Hopkins. Hopkins admitted the indebteness and asked me not to bring suit on it before the first day of April; that on that day he would pay it. He failed to pay it, and I therefore brought suit. I have computed the interest on the note and find it to be $84.83; note, $1,314.65; total, $1,399.48.

To all of which evidence the defendant, by his counsel,
25 then and there objected for the reason that it was immaterial, incompetent, and improper; but *but* the court overruled defendant's objections and permitted the same to go to the jury; to which ruling and decision of the court the defendant, by his counsel, then and there excepted.

The foregoing was all the evidence introduced on the trial of this cause.

The court thereupon instructed the jury to find for the plaintiffs; to the giving of which instructions defendants, by his counsel, then and there excepted; and thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by his counsel, then and there moved the court to arrest the judgment and set aside the verdict and grant a new trial of this cause, and filed the following reasons in writing for his motions:

1st. Because improper, incompetent, and inadmissible evidence was permitted by the court to go to the jury.

2nd. Because of a fatal variance between the note sued on and the note introduced in evidence by the plaintiff.

3rd. Because the note introduced in evidence was wholly incompetent and improper as evidence for any purpose and did not sustain plaintiffs' declaration.

4th. Because the court admitted said note in evidence without regard to the variance aforesaid.

5th. Because neither the original nor a copy of the note declared on by plaintiffs was attached to or filed with their declarations in said cause, nor any reason whatever given why the same was not filed; but the court denied the motion and gave judgment on the verdict against the defendant; to which decision of the court in denying such motion the defendant, by his counsel, then and there excepted.

26 Forasmuch, therefore, as the matters above set forth do not fully appear of record the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made, which is accordingly done this 16th day of November, 1882.

JOSEPH BELL, [SEAL.]
Judge 2nd Dist. N. M.

I consent to the signing of this bill of exceptions as above prepared.

W. B. CHILDERS,
Att'y for Plaintiffs.

Cert'f. of Clerk.

TERRITORY OF NEW MEXICO, } ss:
Second Judicial District, County of Bernalillo, }

I, Edmund H. Smith, clerk of the second judicial district court of the Territory, do hereby certify that the foregoing pages, numbered 1 to 4, 4½, 5–25, contain a true copy of the records and all proceeding in the cause of William C. Orr and De Courcey B. Linsley *vs.* Lambert N. Hopkins as the same remains of record in my office.

Witness my hand and the seal of said district court this 22nd December, 1882.

EDMUND H. SMITH, *Clerk.*

27 And afterwards, to wit, on the 3d day of January, 1883, there was filed in the clerk's office of said supreme court the plaintiffs in error's assignment of errors, which said assignment of errors is in the word and figures following, to wit:

Assignment of Errors.

In the Supreme Court. January Term, 1883.

WILLIAM C. ORR and DE COURCEY B. LINDSLEY, Appellees,
vs.
LAMBERT N. HOPKINS, Appellant.

Now comes the said plaintiffs in error and say that there is manifest error in the record in the above-entitled cause, and for cause of error he assigns the following, to wit:

1st. The court erred in instructing the jury to find for the plaintiffs in the court below.

2nd. The court erred in receiving improper testimony offered by the plaintiffs and objected to by the defendants.

3rd. The court erred in refusing to grant a motion for a new trial and an arrest of judgment.

4th. The court erred in refusing to instruct that there was no sufficient evidence offered on the part of the plaintiff- upon which to base a judgment.

5th. The court erred in rendering judgment against the defendant.

6th. The court erred in permitting the note offered in evidence to go to the jury, for the reason that it varied from the note as described in the declaration.

McCOMAS, CATRON & THORNTON,
Attorneys for Appellant.

28 And be it further remembered that on We-n-sday, the tenth day of January, A. D. 1883, term, being the the ninth day of the regular January, 1883, term of the supreme court of the Territory of New Mexico, the foll-ing, among other, proceedings were had, to wit:

Record of Hearing.

WILLLIAM C. ORR and DE COURCEY B. LINDSLEY, Appellees,

vs.

LAMBERT N. HOPKINS, Appellant.

Appeal from second judicial district court.

This cause, now coming on to be heard upon the record, assignment of errors, and briefs on file herein, is argued by W. T. Thornton and T. B. Catron, Esquires, on behalf of said defendant and appellants, and by W. B. Childers, Esquire, on behalf of said plaintiffs and appellees, and is submitted to the court; and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the 5th day of January, 1884, there was filed in the clerk's office of said supreme court a remittitur of judgment in accordance with the opinion of the court on file in said cause by the said appellees, which said remittitur is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *Supreme Court:*

In the Supreme Court of the Territory of New Mexico. January Term, A. D. 1884.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

29 Now comes the plaintiffs in the above-entitled cause, by their attorneys, Wm. B. Childers, and enter a remittitur of the interest allowed in the judgment in this case by the district court of the second judicial district for the county of Bernalillo, so that the said judgment shall be and stand for the sum of thirteen hundred and fourteen and $\frac{65}{100}$ dollars ($1,314.65), with interest thereon at the rate of six per cent. per annum from the first day of October, A. D. 1881, until satisfied, and move the court that said judgment be affirmed for the said amount of $1,314.65 and interest thereon at the rate of six per cent. per annum since the said first day of October, A. D. 1884, and that execution issue therefor against the said defendant, Lambert N. Hopkins, Jr., and the sureties on his appeal bond.

WILLIAM B. CHILDERS,
Attorneys for Appellees.

30 And be it further remembered that on Saturday, the nineteenth day of January, A. D. 1884, being the eleventh day of the regular January term, 1884, *term* of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Motion to Affirm Judgment.

WILLIAM C. ORR *et al.*, Appellees,

vs.

LAMBERT N. HOPKINS, JR.

Appeal from 2nd judicial district.

The said plaintiffs and appellees, by their attorneys, W. B. Childers, Esquire, having heretofore filed in this cause a remittitur in accordance with the opinions of the court on file herein, now comes, by their said attorneys, and move the court to affirm the judgment at the court below for thirteen hundred and fourteen dollars and sixty-five cents, with interest thereon at the rate of six per cent. per annum from the first day of October, A. D. 1881, and that the execution issue therefor against the said defendant, Lambert N. Hopkins, Jr., and the sureties on his appeal bond, and said motion, being argued by counsel as well for said defendant and appellant as for said plaintiffs and appellees, is submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

31 And be it further remembered that on Tuesday, the nineteenth day of February, A. D. 1884, being the nineteenth day of the regular January, 1884, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Order Granting Same.

WILLIAM C. ORR and DE COURCEY B. LINDSLEY

vs.

LAMBERT N. HOPKINS, Appellant.

Appeal from 2nd judicial district.

The said plaintiffs having filed their remittitur in this cause in accordance with the opinion heretofore rendered herein, and the motion of said plaintiffs to affirm the judgment of the court below for thirteen hundred and fourteen dollars and sixty-five cents, with interest thereon at the rate of six per cent. per annum from the first day of October, A. D. 1881, and that an execution issue therefore against defendant and his securities, having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Bristol, granting said motion, affirming the judgment of the court below for said amount, with said interest as aforesaid, against defendant and securities on his appeal bond
32 on file herein, all the members of the court concurring.

It is therefore considered by the court, the said plaintiffs and appellees having filed their remittitur as aforesaid, that the judgment

heretofore entered in this cause in the second judicial district court within and for the county of Bernalillo, at its regular term, 1882, from which court this cause came into this court, be, and the same is hereby, affirmed against defendant and appellant and his securities, and that in accordance therewith the said William C. Orr and De Courcey B. Lindsley recover of the said defendant and appellant, Lambert N. Hopkins, and the said securities on the bond for appeal herein, T. B. Catron and W. T. Thornton, the sum of fifteen hundred and two dollars and sixty-three cents, that being the amount of thirteen hundred and fourteen dollars and sixty-five cents and the interest thereon from the first day of October, A. D. 1881, at the rate of six per cent. per annum, and also their costs in the said district court expended, taxed at —, and that they have execution therefor, and that they also recover of the defendant, Lambert N. Hopkins, and the said securities, T. B. Catron and W. T. Thornton, their cost in the court expended, taxed at seventeen & $\frac{75}{100}$
33 dollars, and that they also have execution therefor; and be it further remembered that on Wednesday, the twenty-third day of April, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a writ of error in the above-entitled cause, the original of which is hereto attached, and is in the words and figures following, to wit:

Copy of Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the Territory of New Mexico, Greeting:

Because that in the record and process and also in the rendering of judgment in the said supreme court of the Territory of New Mexico before you, in a suit between Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, plaintiffs in error, and William C. Orr and De Courcey B. Lindsley, defendants in error, a manifest error has intervened, to the great damage of the said Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then
34 under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ of error, so that you have the same at Washington, the present seat of the National Government, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the 23rd day of April, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of a writ of error from the Supreme Court of the United States to the supreme court of the Territory in a
35 cause wherein Lambert N. Hopkins and securities, Thomas B. Catron and William T. Thornton, plaintiffs in error, *vs.* William C. Orr and De Courcey B. Lindsley, defendants in error, and that the said plaintiff- in error did this day lodge in my office this the said copy of said writ for the said William C. Orr and De Courcey B. Lindsley, defendants in error, pursuant to the provisions of section 1007 of the Revised Statutes of the United States, it being the purpose of said plaintiff- in error to have said writ of error operate as a supersedeas, pursuant to law.

Witness my hand and seal of said supreme court of the Territory of New Mexico this twenty-third day of April, A. D. 1884.

[SEAL.] C. M. PHILLIPS, *Clerk.*

36 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the Territory of New Mexico, Greeting:

Because that in the records and process and also in the rendering of judgment in the said supreme court of the Territory of New Mexico before you, in a suit between Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, plaintiffs in error, and William C. Orr and De Coursey B. Lindsley, defendants in error, a manifest error has intervened, to the great damage of the said Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the present seat of the National Govern-
37 ment, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23rd day of April, in the year of our Lord one thousand eight hundred and eighty-four.

C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

37½ [Endorsed:] Original. Lambert N. Hopkins, Thomas B. Catron, and William T. Thornton, plaintiffs in error, *vs.* William C. Orr and De Coursey B. Lindsley, defendants in error. Writ of error to supreme court of the Territory of New Mexico. Filed April 23rd, 1884. C. M. Phillips, clerk supreme court, Territory of New Mexico.

38 And afterwards, on, to wit, the twenty-third day of April, A. D. 1884, there was filed and entered of record in the office of the clerk of the supreme court of the Territory of New Mexico the following order, which is in words and figures as follows, to wit:

Order Fixing Amount of Supersedeas Bond.

TERRITORY OF NEW MEXICO:

In the Supreme Court. January Term, A. D. 1884.

WILLIAM C. ORR *et al.*, Appellees,

vs.

LAMBERT N. HOPKINS *et al.*, Appellant-.

In this cause, the above-named plaintiffs in error having sued out a writ of error from the Supreme Court of the United States to this court, lately and at the present term thereof rendered therein in favor of said defendants in error and appellees, and application having been duly made to this court therefor by said plaintiffs in error or appellant-, it is ordered that the penalty of the bond in error in said cause, so removed to the Supreme Court of the United States, be, and the sum is hereby, fixed at the sum of three thousand dollars, $3,000.00.

39 It is further ordered that, upon the examination and filing of said bond within sixty days from the rendition of said judgment, with securities to be approved by the chief justice of this court, or one of the associate justices thereof in case of his absence, and upon the plaintiffs in error otherwise complying with the statute in such cases made and provided relating to writs of error from said Supreme Court of the United States, then and thereupon all further proceedings upon the judgment of this court in this cause shall be stayed until the further order of the Supreme Court of the United States in that behalf. It is further ordered that responsible securities, residents of the Territory of New Mexico, and acceptable to the judge approving said bond in error, shall be received and accepted.

(S'g'd) S. B. AXTELL,
Chief Justice.

And afterwards, on, to wit, the 23 day of April, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a supersedeas bond in the above-entitled cause, which is in words and figures as follows, to wit:

Supersedeas Bond.

Know all men by these presents that we, Lambert N. Hopkins a resident of the State of California, and Thomas B. Catron
40 and William C. Thornton, both residents of the county of Santa Fé, in the Territory of New Mexico, principal *and and our* securities, acknowledge ourselves to owe and stand indebted unto William C. Orr and De Courcey B. Lindsley in the sum of three thousand dollars; for the true and lawful payment of which we bind ourselves, our heirs, executors, and administrators, by these presents.

Witness our hands and seals this 9 day of March, 1884.

The condition of the above obligation is such that whereas a judgment was, on the fourth day of February, 1884, rendered in the supreme court of the Territory of New Mexico for the sum of fifteen hundred and two dollars and sixty-three cents and costs of suit against the above principals and in favor of the above obligees; and whereas the above principals have sued out a writ of error in the Supreme Court of the United States in said cause and desire a stay of execution upon said judgment until the finan determination of said cause in said Supreme Court: Now, if the said above principals shall prosecute their said writ of error with effect and answer all damages and costs if they fail to make their plea good and shall satisfy the judgment of the Supreme Court of the United States in case it should affirm the judgment of the supreme court of
41 the Territory of New Mexico against all of the appellants, or in case said writ of error should be dismissed for want of prosecution, if they shall satisfy the judgment of the supreme court of the Territory of New Mexico, from which said writ is sued out, then this obligation to be void; otherwise to remain in full force and effect.

(S'g'd) LAMBERT N. HOPKINS. [SEAL.]
THOMAS B. CATRON. [SEAL.]
W. T. THORNTON. [SEAL.]

STATE OF CALIFORNIA, *County of Placer:*

Before me, the undersigned authority, on this — day of ——, 1884, personally appeared Lambert N. Hopkins, whose name is signed to the foregoing bond, and acknowledged to me that he voluntarily executed the same for the purpose therein mentioned, and that the same was his act and his deed.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the Township No. 3, county of Placer, the day and year in the certificate first above written.

(S'g'd) D. G. ROUSE, [L. S.]
Justice of the Peace.

The above bond is this day approved by me, and the same shall operate as a stay of execution in this cause.

Dated April 28, A. D. 1884.

(S'g'd) S. B. AXTELL,
Chief Justice Supreme Court of the Territory of New Mexico.

42 And afterwards, on, to wit, *on* the 25th of June, 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation in the above-entitled cause, the original of which, with the endorsement thereon, is hereto attached and is in words and figures as follows, to wit:

Citation and Service.

The United States of America to William C. Orr and De Courcey B. Lindsley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1884, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, wherein Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

43 Witness the honorable chief justice of the supreme court of the Territory of New Mexico this 28th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

(S'g'd) S. B. AXTEL,
Chief Justice.

Service of a true copy of the within citation and summons acknowledged to have been made on me this the 3rd day of May, A. D. 1884.

Albuquerque, N. M., May 3rd, 1884.

(S'g'd) WILLIAM B. CHILDERS,
Attorney for Defendant- in Error.

44 And afterwards, to wit, on the — day of April, A. D. 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of valuation in the above-entitled cause, which is in words and figures as follows, to wit:

Affidavit of Value.

TERRITORY OF NEW MEXICO, *ss:*

Personally came before me, clerk of the district court for the first judicial district of the Territory of New Mexico, William T. Thornton, who, being duly sworn, deposes and says that the said Lambert N. Hopkins was plaintiff in error in a cause lately depending in the supreme court of the Territory of New Mexico, entitled Lambert N. Hopkins, plaintiffs in error, *versus* William C. Orr and De Courcey B. Lindsley, who were defendants in error, in which proceedings Thomas B. Catron and William T. Thornton were the securities of the said plaintiff in error, and that on the final hearing of said cause

judgment was rendered against the said plaintiffs in error and his securities, and that the said plaintiffs in error and his securities, being dissatisfied with said judgment, have obtained from the Supreme Court of the United States a writ of error to remove said cause to the last above-mentioned court; and this deponent
45 further says the amount in controversy in said cause exceeds the sum of one thousand dollars, exclusive of costs.

(S'g'd) W. T. THORNTON.

Subscribed and sworn to before me this the — day of April, 1884, at the district and Territory first above written.

[SEAL.] (S'g'd) C. M. PHILLIPS, *Clerk*,
By S. BURKHART, *Deputy*.

46 *Original Citation and Service.*

The United States of America to William C. Orr and De Coursey B. Lindsley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1884, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, wherein Lambert N. Hopkins and his securities, Thomas B. Catron and William T. Thornton, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs, as in the writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the supreme court of the Territory of New Mexico this 28th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

S. B. AXTELL,
Chief Justice, &c.

46½ Service of a true copy of the within citation and summon- acknowledged to have been made on me on this the 3rd day of May, A. D. 1884.

WILLIAM B. CHILDERS,
Attorney for Defendants in Error.

Albuquerque, N. M., May 3rd, 1884.

47 And heretofore, on, to wit, the 14th day of October, 1883, there was filed in the office of the clerk of said court an opinion of judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendment to rule eight of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

Opinion of Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO:

Supreme Court. January Term, 1883.

ORR and LINDSLEY
vs.
LAMBERT N. HOPKINS. } Cause No. 154.

Appeal from the district court of Bernalillo county.

The declaration in this cause, in addition to the common counts, in assumpsit, contains a special count upon a promissory note in words as follows:

For that whereas the said defendant heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and eighty-one, at, to wit, the city of Saint Louis, Missouri—that is to say, at, to wit, the county of Valencia aforesaid—written St. Louis, made his certain promissory note, in writing, having date a
48 certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, four months after the date thereof, to the order of said plaintiffs, the sum of thirteen hundred and fourteen and $\frac{65}{100}$ dollars, for value received, with interest at the rate of ten per cent. per annum from maturity, and then and there delivered the said promissory note to the said plaintiffs, by means whereof and by force of the statute in such cases made and provided the said defendants then and there become liable to pay to the said plaintiffs the said sum of money in the said promissory note (mentioned), and, being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county of Valencia aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified, according to the tenor and effect thereof.

At the time of filing the declaration there was filed therewith a promissory note, in writing, in the words and figures as follows:

$1,314.65. ST. LOUIS, *October 1st*, 1884.

49 Four months after date I, the subscriber, of Ft. Wingate, county of ——, *State* of New Mexico, promise to pay to the order of Orr and Lindsley (a firm composed of William C. Orr and De Courcey B. Lindsley) thirteen hundred and fourteen and $\frac{65}{100}$ dollars, with exchange, for value received, with interest at the rate of ten per cent. per annum after maturity until paid, without defalcation or discount, negotiable and payable at 1st Nat. Bank, Santa Fé, N. M.

(S'g'd) L. N. HOPKINS, JR.

The defendant pleaded the general issue. Upon the trial the plaintiffs offered in evidence the promissory note filed with the declaration. This was objected to on the grounds, 1st, that it was

not a negotiable promissory note in that it provided for the payment of exchange over and above the principal and interest therein specified, which rendered the amount to be paid thereon unliquidated and uncertain, and, not being a promissory note, it did not impart a consideration.

The note was further objected to as evidence on the ground of variance between it and the note declared on in the special court.

Both of these objections were overruled by the court, and the
50 note was received in evidence under exceptions. The only additional evidence for the plaintiffs was that — the witness Childers, which was very brief and as follows:

GENTLEMEN OF THE JURY: I state under my oath to you that on or about the 7th day of March of this year I went to Ft. Wingate for the purpose of seeing the defendant in this case, Lambert N. Hopkins, in regard to the notes sued on and the collection of the debt of which it is the evidence. I presented this note to L. N. Hopkins. Hopkins admitted the indebtedness and asked me not to bring suit on it before the 1st day of April; that on that day he would pay it. He failed to pay it, and I therefore brought suit. I have computed the interest on the note and find it to be $84.83; note, $1,314.65; total, $1,399.48. This testimony was also objected to on behalf of defendant on the ground of its being immaterial, incompetent, and improper.

The objections were overruled, and the evidence went to the jury under exceptions. No testimony was offered on behalf of the defendant.

No instructions were asked for by either party. The court thereupon, on its own motion, charged the jury to find for the plaintiffs.

This instruction was excepted to on behalf of defendant.
51 The jury rendered a verdict for plaintiffs in the sum of $1,399.48.

Defendants interposed motions in arrest of judgment and for a new trial, which were overruled, and judgment rendered for the plaintiffs in the amount specified in the verdict and cost-. Numerous errors are assigned on behalf of the plaintiffs in error, but it is necessary to consider only those that are based upon the objections and exceptions already refer-ed to.

Whether, under any circumstances, the terms as to payment of exchang- would destroy the character of an instrument in writing as a promissory note which otherwise would be a perfect promissory note, which may be doubted, no such question can arrise in this case.

The terms of the note as to exchange are mere surplusage and have no significance whatever.

The note was made negotiable and payable at the 1st Nat. Bank of Santa Fé, and payment at that bank, principal and interest, without payment of any exchange, would have been a full and complete satisfaction of the note.

The note received in evidence is in all respects upon its face a valid, negotiable promissory note, and the law implies a consideration for the promise therein contained.

52 The objections to the note received in evidence, that it varies from the note as declared on, is no doubt well taken so far as the special count in the declaration is concerned.

No principle of law is better settled under any system of pleading than when a promissory note, bill of exchange, or other instrument of writing is sued on it must be set out in the declaration in each and all its natural terms and conditions, according to their precise legal effect.

1st Chit. Pl., 305, with note 3, and authorities cited.

What constitutes the variance between the note as declared on in this case and the note received in evidence is the former is made negotiable and payable generally or absolutely while a limitation is placed upon the latter in that it is made negotiable and payable at a particular, specified place.

It cannot be said, therefore, that the terms of both have the same legal effect.

This has always been considered a fatal variance. 1st Cht. P'g, 309, 14 set., 43; 9 Wheat., 558; 4 Cr. C. C., 11.

Had the declaration contained only the special count on the promissory note it is clear that, upon the evidence received
53 under objections, it would have been error to have rendered judgment therein for the plaintiffs in any sum whatever; but it seems that now the practice is sustained by high judicial authority of receiving promissory notes and bills of exchange as *prima facie* evidence in support of any or all the common coutrs, in assumpsit, between the immediate parties.

2 Greenleaf on Ev., sec. 112.

It is difficult to comprehend the reasonableness of the practice to the — it has been carried by some of the courts. It must necessarily lead to many absurdities.

For instance, upon the common court for money lent, or, if supported by oral testimony, it would be necessary to prove that the transactions was essentially a loan of money, yet it is held that a promissory note, though it may have been given for work and labor, may be received to support the common court for money loaned. However this may be on principle it is clear that every promissory note or bill of exchange necessarily includes an account stated between the immediate parties thereto—that is, that there had been a prior transaction or transactions between the parties involving indebtedness from one to the other, a mutual settlement thereof
54 upon examination, and an acceptance thereof by them resulting in finding a certain amount in money to be due and a promis-, express or implied, to pay the same.

Upon every account stated the law implies a valuable consideration and is necessary to inquire into the nature or items of the original account. 1 Chit. P., 358. Proff of a settlement and stated account between the parties makes out a *prima facie* case.

A promissory note, therefore, is, from its very terms, the most satisfactory evidence that there had been a settlement between the par-

ties and that the principal sums therein specified had been found to be due from the maker to the payee.

Chit. on Contracts, 10th American Ed., 723.

The promissory note, therefore, was properly received in evidence in support of the common court upon an account stated; as no judgment could be properly rendered under the evidence on the special count on the promissory note, then we are to consider the case on the common courts exclusively and as though no such special count was in the declaration. In this view of the case it is evident that the judgment is far a larger sum than is claimed under the
55 com-on courts, which cannot exceed the sum of $1,314.65 on account stated; as no judgment could be properly rendered under the evidence on the special count on the promissory note, then we are to consider the case on the common counts exclusively, and as no such special count was in the declaration. In this view of the case it is evident that the judgment is for a larger sum than is claimed under the common counts, which cannot exceed the sum of $1,314.65 and interest at the rate of six per cent. per annum from the date of the stated account between the parties to the date of this judgment. This is all that can be claimed under the common counts and is all that is claimed in the declaration on this counts. At common law, in the absence of any statutory provisions as to interest, none whatever could be recovered on any of the common counts.

1st Chit. Pl., 356.

If at the date of the account stated there was a provision to pay interest at a stipulated rate above legal interest, then to recover the same in addition to the amount due on the account stated there should have been a count therefor obliging forbearance as the consideration for the promis-. (Void count for interest, 2 Chit. Pl., 88.

Our statute allows interest at the rate of six per cent. per
56 annum on money due upon the settlement of matured accounts. Price Stat., 414. This, of course, covers an account stated, and may be recovered on a count; on an account stated judgment cannot be rendered for a greater amount than the damages laid in the declaration. (Hogan *vs.* Taylor, Hump., 20.)

On the common counts, therefore, the plaintiff is entitled to recover only the sum of $1,314.65 and interest thereon from the 1st day of October, 1881, at six per cent. per annum, instead of ten per cent., as in the judgment rendered.

The proper practice on appeal, when the record shows a judgment in excess of the amount paid in in the declaration, and the amount of the excess is capable of exact computation, seems to be to permit the creditor to file a *remisure* of the excess, and, if done, to confirm the judgment as to the residue; otherwise, to reverse the judgment and order a new trial. 14 Cal., 640; 10 Iowa, 233; 20 Ind., 306. It is ordered that the defendants in error have leave until the second Monday of January, 1884, to file a *permissore*, as indicated by this opinion, and if done within that time the judgment to be

affirmed as to the residue, and on failure so to do the judgment to be reversed and the cause remanded for a new trial.

57 And heretofore, on, to wit, the 19th day of February, 1884, there was filed in the office of the clerk of said court an opinion of the judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendments to rule eight of the Supreme Court of the United States *of the United States*, to be herewith transmitted, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO:

Supreme Court. January Term, 1884.

WILLIAM C. ORR *et al. vs.* LAMBERT N. HOPKINS.

This case was argued and submitted at the last term. A decision was rendered during vacation to the effect that the judgment below was in excess of the amount in which appellees were entitled to recover upon their declaration, the excess being in the amount of interest they were entitled to on the money demand sued on; that the excess of interest being a matter of exact computation the appellees should have leave until the second Monday of January, 1884, to file a remittitur of such excess, and if done within that time the judgment below to be affirmed as to the residue, and on
58 failure so to do the judgment to be reversed and the cause remanded for a new trial.

The remittitur was filed within the —, but the judgment of this court has been delayed for the determination of the further question whether its rendition should be against the appellant's securities on his appeal bond, as well as against himself or against himself alone.

The question is presented on the motion of the appellees that judgment be rendered as well against the securities as the appellant. The securities have appeared by counsel and resist the motion.

The provisions of statute in relation to this question is as follows:

In case of appeal in a civil suit, if the judgment of the appellant court *to* be against the appellant it shall be reversed against him and his securities in the appeal bond. Prince Stat., 242–5.

The judgment of this court under our previous rulings must necessarily be rendered against the appellant, but it is claimed by counsel for the securities that inasmuch as the judgment appealed from has been modified by this court the securities are discharged from liability. The statute in regard to appeal bonds in appeals to this court is as follows:

59 Upon the appeal being made the district court shall make an order allowing the same. Such allowance shall stay the execution. * * *

When the appellant or some responsible person for him, together with two sufficient securities, to be approved by the court during the same term at which the judgment or decision appealed from was rendered, enter into a recognizance to the adverse party in a sum sufficient to secure the debt, damages, and costs recovered by such

judgment or decision, together with the interest that may grow thereon and the costs and damages which may be recovered in the supreme court, conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the supreme court, and that if the judgment or decision appealed from be affirmed or the appeal be dismissed he will preform the judgment of the district court, and that he will also pay the costs and damages that may be adjudged against him upon his appeal. *Id.* 68, § 4.

60 The condition of the appeal bond in this case is in compliance with the above statute on this subject, and in case of an affirmation of the judgment or a dismissal of the appeal it covers not only payment of the judgment appealed from, *and* also all damages and costs that shall be adjudged against the appellant by this court.

The precise point on which the remittitur was permitted to be filed in this court was not raised in the court below. It is true, however, that there were general objections and exceptions to all the proceedings, including all the evidence addressed on the trial; but it is quite evident, from an examination of the record, that the gist of the defence was that there was no evidence to sustain a judgment in any amount whatever, and this also in the substantial grounds of the appeal.

Neither was the question raised by counsel in this court. It was raised for the first time by this court on its own motion, which no doubt it might do in the exercise of its discretion in the furtherance of justice, the statute against entertaining any exceptions not taken in the court below being directory and permissive only. On the case as submitted either of these modes of final disposition was open to us.

61 Under the statute, that no exceptions shall be taken in an appeal to any proceedings in the district court, except *as* such as shall have been expressly decided in that court (*Id.* 68, § 5), we might have affirmed this entree judgment on this ground, that the question as to the excessive interest was not raised in the court below or in manner alluded to by either party, and was not, therefore, specifically ruled on (6 Wal., 225,) or, the excessive interest being a matter of exact computation, we might have given judgment for the proper amount in this court under the following provision of statute: The supreme court, in appeals or writs of error, shall examine the records and on the facts ther-on contained alone shall award a new trial, reverse or affirm the judgment of the circuit court, or give such other judgment as to them shall seem agreeable to law (Wid., 69, sec. 7), or we could, as was done in this case, give to the appellees their option to file a remittitur covering the excessive interest and have the judgment affirmed as to the residue; otherwise, to submit to a reversal and — trial do move.

62 Neither of these modes of disposition can be considered as a reversal so as to discharge the securities on the appeal bond, except on failure to file the remittitur. Had the point as to the excessive interest been raised in the court below and overruled and excepted to the case, no doubt, would have been received from a dif-

ferent standpoint, but, that specific question not having been raised or ruled upon, the appeal cannot be considered as having been taken to correct that irregularity.

It may be fairly presumed that had the point been raised the irregularity would have been promptly corrected in the court below.

The cases of Rothgerbir *et al. vs.* Wanderly, 66 Ill., 390, and Chase *vs.* Bris *et al.*, Cal., 517, are much relied on by the securities in this appeal bond as authority showing their exemption from liability, but in each of those cases the judgment appealed from was actually reversed and remanded to the court below with instructions to enter a different judgment.

In the case at bar there is no such reversal and remand-
63 ing for a different judgment. The judgment of this court upon our provisions ruling should affirm the judgment below, after deducting therefrom the amount of the remittitur filed as aforesaid, and that the appellees recover of the appellants and his securities named in his appeal bond the specified amount of such residue and their costs, and that they have execution therefor.

Per BRISTOL, *J.*

I concur.
AXTELL, *C. J.*

UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the records of proceedings had, judgment given, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this 25th day of June, A. D. 1884.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS, *Clerk.*

64 *Assignment of Errors.*

In the Supreme Court of the United States. October Term, A. D. 1886.

LAMBERT N. HOPKINS, THOMAS B. CATRON, and WILLIAM T. THORNTON, Plaintiffs in Error,

vs.

WILLIAM C. ORR and DE COURSEY B. LINDSLEY, Defendants in Error.

And now come Lambert N. Hopkins, Thomas B. Catron, and William T. Thornton, the plaintiffs in error, by John H. Knaebel, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The district court which gave judgment in the said cause had not jurisdiction to give the said judgment, in that, at the time of

giving and entering the said judgment, the term of the said district court at which the verdict in the said cause was rendered had expired, and the said judgment was given and entered in vacation.

2nd. The trial court erred in permitting the plaintiffs below to introduce and read in evidence, over the objection of the defendants below, the alleged promissory note which is set out in full in the bill of exceptions, and this for the reason that the said alleged note so read in evidence was a different and variant instrument from the promissory note described in the first count of the declaration and upon which the said first count is based, and for the further reason that the said evidence was incompetent, irrelevant, and immaterial, it appearing upon the record that the note sued on was a note for $1,314.65, with interest at ten per cent. from maturity, payable, generally, to the order of the plaintiffs below, and alleged to have been made by Lambert N. Hopkins, but that the instrument so read in evidence was signed "L. N. Hopkins, Jr.," and by its terms was made payable "with exchange," and was made "negotiable and payable at First National Bank, Santa Fé, N. M." which variance between the allegations and the proof these plaintiffs in error here allege to be fatal.

3rd. The trial court erred in holding the said instrument so read in evidence to have been executed by the defendant below,
65 for the reason that it did not appear that the said defendant was a party to the said instrument, and the trial court could not presume that the said defendant was the "L. N. Hopkins, Jr.," whose name was to the said instrument subscribed; and no proof was given of the signature to the said instrument.

4th. The trial court erred in holding that the said instrument, so read in evidence, imported a consideration.

5th. The trial court erred in instructing the jury, over the objection of the defendant below, "to find for the plaintiffs," for the reasons that all the evidence in the case, taken together, failed to support the said declaration or any count therein or part thereof; that the written instrument read in evidence on the part of the plaintiff below was not a promissory note and was different and fatally variant from the promissory note described in the said declaration; that the said written instrument was not proved to be the act of the defendant below or to have been executed by him; that the said written instrument did not import a consideration; that no consideration for the promise contained in the said instrument was proved; that no evidence whatever was adduced by the plaintiffs below to support the money counts or any other part of the said declaration, but all the evidence had reference to the first count; that the said written instrument, either of itself or taken in connection with the testimony of the witness, W. B. Childers, did not prove or tend to prove any count or part of the said declaration, and that, upon the whole evidence, the plaintiffs below were not entitled to a verdict in their favor, but, on the contrary, the defendant below was entitled to a verdict in his favor.

6th. The trial court erred in giving judgment in the sum of $1,399.48, for the reason that the said sum includes interest computed

at the rate of ten per cent. per annum, whereas, by the laws of the said Territory, only the rate of six per cent. per annum was lawful in the absence of a special contract to the contrary, and also because the said interest was computed from the date of the said instrument put in evidence, and not from the maturity thereof.

7th. The supreme court of the Territory of New Mexico erred in refusing to reverse the judgment of the said district court, for the reason that the said judgment rendered and entered in vacation of the said district court was unauthorized by law and without jurisdiction.

8th. The said supreme court erred in refusing to reverse the judgment of the said district court and to grant a new trial of the
66 said cause, for the reason that the verdict and judgment in the said trial court were without evidence, competent and relevant, to support the same.

9th. The said supreme court erred in holding and deciding that the instrument read in evidence and styled a promissory note was "properly received in evidence in support of the common count upon an account stated," for the reason that the said instrument was neither offered, received, or considered by the trial court as evidence for that purpose; for the further reason that the said instrument was not proved to have been signed by the defendant or to be his act, and it was not competent, relevant, or material for the said purpose.

10th. The said supreme court erred in holding and deciding that the said instrument was evidence of an account stated October 1st, 1881, the date of the said instrument, for the reason that the said instrument did not by its terms mature until four months after said date.

11th. The said supreme court erred in holding and deciding that under the count for an account stated the said instrument was sufficient evidence to entitle the plaintiffs below to recover six per cent. interest (the legal rate) from the first day of October, A. D. 1881, the date of the said instrument, for the reason that by the terms of the said instrument the principal sum therein mentioned did not mature or become payable until four months after the said date, and could not bear any interest whatever until from and after such maturity.

12th. The said supreme court erred in holding and deciding that upon filing a remission of four per cent. interest, $1,314.65 (the principal sum expressed on the said instrument), calculated from the date thereof, the plaintiffs below were entitled to judgment for the said sum of $1,314.65 and interest thereon at six per cent from said date.

13th. The said supreme court erred in holding and deciding that the appellees in that court were entitled to judgment against the sureties, Thomas B. Catron and William T. Thornton, for the sum for which the said judgment was affirmed and in giving judgment accordingly against the said sureties, for the reason, first, that the judgment of the district court was not affirmed by the said supreme court within the meaning and contemplation of the supersedeas bond to which the said sureties were parties, and, secondly, that the

judgment so rendered by the said supreme court against the said sureties includes interest calculated on the said sum of $1,314.65
67 from the first day of October, A. D. 1881, the date of the said instrument, instead of from the first day of February, A. D. 1882, the date of maturity of the said instrument.

14th. The said supreme court erred in holding and deciding that the said sureties, Thomas B. Catron and William T. Thornton, were liable for costs of the said district court and supreme court and in giving judgment against them for the amount of the said costs.

15th. Inasmuch as the appellant in the supreme court of New Mexico gained a reduction of the judgment of the district court by his appeal, the judgment of the appellate court was favorable to the appellant and against the appellees; and therefore the supreme court erred in giving any judgment against the sureties.

By reason whereof the plaintiffs pray that the said judgment be reversed, etc.

JNO. H. KNAEBEL,
Attorney for Plaintiffs in error.

68 [Endorsed:] UnitedStates Supreme Court. October term, 1887. No. 140. Lambert N. Hopkins *et al.*, plaintiffs in error, *vs.* Wm. C. Orr *et al.*, d'f'ts in error. Assignment — errors. [Stamped:] Office Supreme Court U. S. Filed Aug. 8, 1887. James H. McKenney, clerk.

Endorsed on cover: New Mexico Territory supreme court. No. 140. Lambert N. Hopkins, Thomas B. Catron, and William T. Thornton, plaintiffs in error, *vs.* William C. Orr and De Coursey B. Lindsley. Filed 20th October, 1884.

124-370

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D., 1887.

LAMBERT N. HOPKINS, THOMAS B. CATRON AND WILLIAM T. THORNTON, *Plaintiffs in Error,*

vs.

WILLIAM C. ORR AND DE COURSEY B. LINDSLEY, *Defendants in Error.*

No. 140.
Error to the Supreme Court of New Mexico.

BRIEF OF PLAINTIFFS IN ERROR.

JNO. H. KNAEBEL,

Counsel for Plaintiffs in Error.

Santa Fe Daily New Mexican Steam Print.

IN THE

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vs.
WILLIAM C. ORR AND DE COURSEY B. LINDSLEY, *Defendants in Error.*

No. 140.
Error to the Supreme Court of New Mexico.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of Case.

This is an action of assumpsit instituted by the defendants in error against Lambert N. Hopkins, one of the plaintiffs in error, in the Second Judicial District Court of the Territory of

New Mexico, for the county of Valencia, but subsequently transferred to the county of Bernalillo, and there tried. The declaration (*Record*, pp. 1, 2, 3), contains a special count upon a promissory note and also the common counts. Issue was duly joined upon pleas of non-assumpsit and payment. (*Ib.* pp. 5, 6.)

The jury rendered a verdict in favor of the defendants in error, under the direction of the court (*Ib.* p. 13), but the verdict, as stated in the record (*Ib.* p. 6), fails to mention any *money*—being merely for the plaintiff—in sum of thirteen hundred and ninety-nine $\frac{48}{100}$."

The evidence introduced upon the trial was very brief, consisting only of an alleged note and of a short statement of the attorney Mr. W. B. Childers. (*Ib.* p. 12.)

The instrument produced was variant from the note sued on, because it was payable "with exchange," at a place certain, and was signed "L. N. Hopkins, jr.;" whereas the note sued on was the note of Lambert N. Hopkins, payable generally and without exchange. (*Ib.* p. 2.)

The only oral testimony was as follows: (*Ib.* pp. 12, 13.)

"Gentlemen of the Jury: I state under my oath to you that, on or about the 7th day of March of this year, I went to Fort Wingate for the purpose of seeing the defendant in this cause, Lambert N. Hopkins, in regard to the note sued on and the collection of the debt of which it is the evidence. I presented this note to L. N. Hopkins. Hopkins admitted the indebtedness and asked me not to bring suit on it before the first day of April; that on that day he would pay it. He failed to pay it, and I therefore brought suit. I have computed the interest on the note and find it to be $84.33; note $1,314.65; total $1,399.48."

No other evidence whatever was introduced on the trial.

The defendant below objected to the introduction of the alleged note as variant from the note sued on and as improper and incompetent, and not sustaining the declaration. The objection was overruled and the defendant below excepted. (*Ib.* p. 12.)

The testimony of the witness W. B. Childers was also duly objected to, and exception to its admission was duly taken. (*Ib.* p. 13.)

The trial court overruled motions for new trial and in arrest of judgment (*Ib.* p. 13), and thereupon judgment upon the verdict was entered for $1,399.48 and costs. (*Ib.* p. 6,)

The motions were decided in vacation under a stipulation of attorneys (*Ib.* pp. 8, 9), which stipulation also provided for an appeal to be taken in vacation (although, as hereafter shown, all appeals must be taken in term time). The motions were denied at Chambers, June 15th, 1882 (*Ib.* folio 9), and subsequently, at Chambers and in vacation—June 22, 1882—An appeal was prayed and allowed and a *supersedeas* bond filed, to which Thomas B. Catron and William T. Thornton were sureties. (*Ib.* pp. 9, 10, 11.)

Upon the hearing of the appeal, the Supreme Court of the Territory at the January term A. D. 1883, held (*Ib.* p. 25) that "the objection to the note received in evidence that it varies from the note as declared on is no doubt well taken so far as the special count in the declaration is concerned;" but, disregarding, as we contend, the patent fact that the special count only was relied on at the trial, the Supreme Court further held that the evidence sustained the count upon an account stated, to the extent of the principal sum ($1,314.65) expressed upon the instrument in evidence and interest thereon from date at six per cent. (the statutory rate.) That instrument bore interest at ten per cent. from maturity—four months after date. The interest was calculated by the witness on the trial at ten per cent. from date. The Supreme Court holding that the judgment was excessive to the extent of four per cent interest from date of the said instrument, ordered it to be reversed and a new trial had, unless the plaintiffs below should remit the excess by the second Monday of January, 1884. (*Ib.* pp. 26, 27.)

Within the allotted time, the plaintiffs below filed a remittitur of interest, so that the judgment should stand for $1,314.65 and interest thereon at six per cent. from October 1, 1881 (the date of the said alleged note) until satisfied (*Ib.* p. 15), and moved the Supreme Court, at the January Term, A. D., 1884, for judg-

ment against the plaintiffs in error, as appellee and sureties on the said appeal. (*Ib.* p. 27.)

The Supreme Court gives judgment not only against Lambert N. Hopkins, but also against his sureties Thomas B. Catron and William T. Thornton, in the sum of $1,502.63, (*Ib.* p. 17), being the amount of $1,314.65, and the interest thereon from the first day of October, A. D., 1881, at the rate of six per cent. per annum, and also for the costs as well in the District as in the Supreme Court.

To reverse this judgment of the Supreme Court against all the plaintiffs in error, as well as the judgment of the District Court against Lambert N. Hopkins, is the purpose of the present writ of error.

ASSIGNMENT OF ERRORS.

1st (Waived.)

2nd The trial court erred in permitting the plaintiffs below to introduce and read in evidence, over the objection of the defendants below, the alleged promissory note which is set out in full in the bill of exceptions, and this for the reason that the said alleged note so read in evidence was a different and variant instrument from the promissory note described in the first count of the declaration and upon which the said first count is based, and for the further reason that the said evidence was incompetent, irrelevant, and immaterial, it appearing upon the record that the note sued on was a note for $1,314.65, with interest at ten per cent. from maturity, payable generally, to the order of the plaintiffs below, and alleged to have been made by Lambert N. Hopkins, but that the instrument so read in evidence was signed "L. N. Hopkins, jr.," and by its terms was made payable with exchange, and was made negotiable and payable at First National Bank, Santa Fé, N. M., which variance between the allegations and the proof these plaintiffs in error here allege to be fatal. (*Record*, pp. 2, 12, 13.)

3rd The trial court erred in holding the said instrument so read in evidence to have been executed by the defendant below, for the reason that it did not appear that the said defendant was a party to the said instrument, and the trial court could not presume that the said defendant was the "L. N. Hopkins, jr., whose name was to the said instrument subscribed; and no proof was given of the signature to the said instrument. (*Ib.*)

4th The trial court erred in holding that the said instrument, so read in evidence, imported a consideration. (*Ib.*)

5th The trial court errred in instructing the jury, over the objection of the defendant below, to find for the plaintiffs, for the reasons that all the evidence in the case, taken together, failed to support the said declaration or any count therein or part thereof; that the written instrument read in evidence on the part of the plaintiff below was not a promissory note and was different and fatally variant from the promissory note described in the said declaration; that the said written instrument was not proved to be the act of the defendant below or to have been executed by him; that the said written instrument did not import a consideration; that no consideration for the promise contained in the said instrument was proved; that no evidence whatever was adduced by the plaintiffs below to support the money counts or any other part of the said declaration, but all the evidence had reference to the first count; that the said written instrument, either of itself or taken in connection with the testimony of the witness, W. B. Childers, did not prove or tend to prove any count or part of the said declaration, and that, upon the whole evidence, the plaintiffs below were not entitled to a verdict in their favor, but, on the contrary, the defendant below was entitled to a verdict in his favor. (*Ib.*)

6th The trial court erred in giving judgment in the sum of $1,399.18, for the reason that the said sum includes interest computed at the rate of ten per cent. per annum, whereas, by the laws of the said Territory, only the rate of six per cent. per annum was lawful in the absence of a special contract to the contrary, and also because the said interest was computed from the date of the said instrument put in evidence, and not from the maturity thereof. (*Ib.* 6, 12, 13)

7th. The supreme court of the Territory of New Mexico erred in refusing to reverse the judgment of the said district court, for the reason that the said judgment rendered and entered in vacation of the said district court was unauthorized by law and without jurisdiction.

8th The said supreme court erred in refusing to reverse the judgment of the said district court and to grant a new trial of the said cause, for the reason that the verdict and judgment in the said trial court were without evidence, competent and relevant, to support the same.

9th The said supreme court erred in holding and deciding that the instrument read in evidence and styled a promissory note was "properly received in evidence in support of the common count upon an account stated," for the reason that the said instrument was neither offered, received nor considered by the trial court as evidence for that purpose; for the further reason that the said instrument was not proved to have been signed by the defendant or to be his act, and it was not competent, relevant, not material for the said purpose. (Record, p. 26)

10th The said supreme court erred in holding and deciding that the said instrument was evidence of an account stated October 1st, 1881, the date of the said instrument, for the reason that the said instrument did not by its terms mature until four months after said date. (*Ib.*)

11th The said supreme court erred in holding and deciding that under the count for an account stated the said instrument was sufficient evidence to entitle the plaintiffs below to recover six per cent. interest (the legal rate) from the first day of October, A. D., 1881, the date of the said instrument, for the reason that by the terms of the said instrument the principal sum therein mentioned did not mature or become payable until four months after the said date, and could not bear any interest whatever until from and after such maturity. (*Ib.*)

12th The said supreme court erred in holding and deciding that upon filing a remission of four per cent. interest, on $1,314.65 (the principal sum expressed on the said instrument), calculated from the date thereof, the plaintiffs below were entitled to judgment for the said sum of $1,314 65 and interest thereon at six per cent. from said date. (*Ib.*)

13th The said supreme court erred in holding and deciding that the applees in that court were entitled to judgment against the sureties, Thomas B. Catron and William T. Thornton, for the sum for which the said judgment was affirmed and in giving judgment accordingly against the said sureties, for the reason, first, that the said judgment of the district court was not affirmed by the said supreme court within the meaning and contemplation of the supersedeas bond to which the said sureties were parties, and, secondly, that the judgment so rendered by the said supreme court against the said sureties includes interest calculated on the said sum of $1,314.65 from the first day of October, A. D. 1881, the date of the said instrument, instead of from the first day of February, A. D., 1882, the date of maturity of the said instrument. (*Ib.* p. 29)

14th The said supreme court erred in holding and deciding that the said sureties, Thomas B. Catron and William T. Thornton, were liable for costs of the said district court and supreme court and in giving judgment against them for the amount of the said costs. (*Ib.*)

15th Inasmuch as the appellant in the supreme court of New Mexico gained a reduction of the judgment of the district court by his appeal, the judgment of the appllate court was favorable to the appellant and against the appellees; and therefore the supreme court erred in giving any judgment against the sureties.

ADDITIONAL ASSIGNMENT OF ERRORS.

16th The district court erred in that its judgment does not conform to the verdict, because the verdict does not name any sum of money and the judgment specifies the sum of $1,399.48. (*Record*, p. 6)

17th The supreme court erred in that its judgment (*Record*, page 17) does not conform to the *Remititur* (*Ib.*, page 15) because such judgment includes interest to its date and leads to a compounding of interest while the *Remititur* extends to all interest except simple interest "at six per cent. per annum from the first day of October, A. D., 1881, until satisfied."

18th The supreme court erred, because, in effect, it cancelled an erroneous judgment rendered on a promissory note described in the special count; it rendered another judgment on the original indebtedness evidenced by another promissory note, not referred to in the pleadings, made by another party containing other and different conditions; and allowed interest on said other maker's indebtedness during the life-time of the note relied on to prove said indebtedness, which note so relied on, did not provide for any interest during said period; and all this without any proof of the execution by anybody of said promissory note.

19th The Supreme Court erred in giving judgment against the sureties, because no law authorized so summary a proceeding, the *supersedeas* bond was void, or at best, a mere common law obligation, upon which the sureties were entitled to a trial at common law.

20th The Supreme Court erred in assuming jurisdiction to review the judgment of the District Court under the authority of the statutes relating to appeals; since no statutory appeal could be prayed, allowed, or taken in vacation. (*Record*, pages 9, 10, 11.)

ARGUMENT.

Within the scope of the foregoing assignment of errors, we urge the following propositions:

I.

There was a fatal variance between the promissory note declared on and the instrument introduced in evidence.

This is conceded by the Supreme Court of the Territory (Record, p. 25) and is demonstrated by several decisions of this court:

Covington vs. Comstock, 14 Pet. 43.
Sheehy vs. Mandeville, 7 Cranch, 208.
Sebree vs. Dorr, 9 Wheaton, 558.

II.

Although the declaration includes the common counts, the proofs and verdict were appropriate to the special count only; the common counts were in effect abandoned on the trial, the testimony of the witness W. B. Childers did not prove the common counts, and, even if it tended that way, different minds might reach different conclusions as to the import of the testimony, and the jury, if left free by the court, might well have declined to find the common counts supported by the evidence, although they might have regarded the special count as sustained by the instrument improperly introduced. The verdict, being general, was bad.

It will be seen (Record, p. 12) that the plaintiffs below "to maintain the issue upon their part," were permitted over objection and exception to give in evidence the pretended promissory note. It is signed "L. N. Hopkins, Jr." Without proof that the defendant below had signed it, and without proof identifying "L. N. Hopkins, Jr." as such defendant, it was read to the jury on its mere production; manifestly upon the theory that it answered the description of the note sued on as stated in the special count, and that proof of execution was made unnecessary by the statute below cited, (See Compiled Laws of New Mexico § 1922).

"When a written instrument is referred to in a pleading and the same or a copy thereof is incorporated in or attached to such pleading, the genuineness and due execution of such written instrument and of every endorsement thereon shall be deemed admitted, unless in a pleading or writing filed in the cause within the time allowed for pleading, the same be denied under oath."

It is evident that the instrument was offered and admitted under the special count.

The witness W. B. Childers, then testified (*Ib.* p. p. 12, 13,) that he presented "this note to L. N. Hopkins," (not identifying the defendant,) who "admitted the indebtedness," and requested the witness not to bring suit on it before a day named, when he would pay it; and the witness proceeded: "I have computed the interest on the note and find it to be $84.83; note $1,314,65; total $1,399.48."

Upon this, is it not clear that the special count only was relied on; that the instrument was offered and admitted as the note therein described; and that interest at ten per cent. was calculated and insisted on by virtue of the note, as such, and under the claim made by the special count?

When this witness testified, the instrument was already in evidence, having been admitted improperly as the instrument specially declared on and as proving itself. The chief object of the oral testimony was to show the computation of interest —not to prove the instrument to be the act of the defendant

below. The testimony fails, in the slightest degree, to connect the defendant below, either with the execution of the paper or with the declaration made by "L. N. Hopkins" to the witness. Whether "L. N. Hopkins" was the defendant Lambert N. Hopkins, or his father, or son, of similar name, or somebody named Lewis, Lawrence, Luther, or otherwise, appropriately to the same initials nowhere appears. The failure to elucidate the point arose from the supposed presumption of identity derived from the instrument itself, by force of the above cited statute. It is even uncertain whether the witness, by the words "this note," referred to the note described in the special count or the instrument actually produced. The uncertainty in this respect suggests the application of the doctrine of *Shaver v. Ehle*, 16 Johns, 202.

"The case stood, therefore, without proof of identity to submit to the jury as a question of fact." (*Burford v. McCue*, 53 Pa. St. p. 431.)

While the word "*junior*" added to a name is a mere *descriptio personae*, yet it is a significant factor in determining the question of identity. When a record or a written instrument is in the name "Samuel Boyden, *Junior*," it cannot be made available by pleading or in evidence in favor of or against "Samuel Boyden," without some averment or proof as to identity. There is no favorable presumption of law to be indulged in the absence of such averment or proof. Thus, in *Boyden v. Hastings*, 34 Mass. (17 Pick,) 200, wherein the declaration set up a judgment in favor of "Samuel Boyden," and, upon oyer, the judgment appeared in favor of "Samuel Boyden, *Junior*," the Supreme Court said: "It seems to us to be very clear that there is no such record as the plaintiff hath set forth in his declaration. If we were to say otherwise, it would be determining that "Samuel Boyden, Junior," was Samuel Boyden, without any averment of the fact. *** And, no doubt, where the person who sues is the same, he may aver the fact in his declaration. Thus, if the fact would support him, the plaintiff might have alleged that he, by the name of Samuel Boyden, recovered the judgment, &c. As the pleadings now stand, we cannot presume that Samuel Boyden, Junior, and Samuel Boyden are the same person. It is true that *Junior* is

no part of the name (Kincaid *vs.* Howe, 10 Mass. R. 205.) But it is used to distinguish the person, and it is used where the father and son are of the same name; and when it is so used, the Court is bound to presume that such is the truth of the case."

On this point, Commonwealth *v.* Beckley, 44 Mass., (3 Metc.,) page 331, is pertinent. The Court says: "Suppose an action is brought in the name of A. B. and there is a special declaration on a promissory note as payable to him, and a note is offered in evidence payable to A. B. Junior, that would be a *variance*, which could not be cured by proof that the note was given to him by the name of A. B. Junior, but he must amend his declaration as was done in Boyden *v.* Hastings. But, suppose in the like case such a note is offered in evidence in an action for money had and received; then the plaintiff may prove that the note was given to A. B. by the name and addition of A. B. Junior, which is alike in principle to the present case."

In that case identity was established by proof.

Here the proof was, we contend, not sufficient to go to the jury, and, if it were sufficient for the consideration of the jury, it was doubtful matter of fact of which they were the exclusive judges. It was not matter for a clear legal inference favorable to the plaintiffs below. Even had the question of the import of the testimony been proper for the consideration of the jury on a free submission without a binding instruction, still a verdict for the plaintiffs below could not have been supported, since the special count not having been taken from the jury, they might erroneously have found on that count alone, for aught that would appear to the contrary. (*Bacon's Abridg.* "Verdict" M.)

Indeed, if this court should not hold the verdict a nullity, because not mentioning any sum of money (*Record*, p. 6) and should presume that dollars were meant, it would appear that the jury actually found on the special count, since the sum or figures returned (1,399.48) can only be accounted for on such presumption, by assuming that the jury included ten per cent. interest, which, while called for by the special count, would not, as admitted by the Supreme Court, be recoverable in any event, upon the common counts. (*Record*, p. 26.)

The verdict is analogous to a general verdict rendered upon several counts, good and bad, as to all of which the evidence is applicable. Such a verdict is bad. If in such case the evidence were exclusively applicable to the good counts, the trial court might, by proper amendment, eliminate the bad counts and apply the verdict to the good counts. But, where the evidence applies as well to the bad counts as to the good, and, especially, where, as here, the evidence is, by the erroneous ruling of the court, admitted to the unavailable count and mainly or exclusively applied to its support, the verdict is radically wrong and could not be aided by amendment. The error is available on review here, and even had it been avoidable by amendment below it would have been equally available here in the absence of such amendment.

See The Bank of United States *v.* Moss, 6 How, pp. 38, 39, and cases there cited, including Hopkins *v.* Beedle, 1 Caines' Rep. 347; Matheson's adm. *v.* Grant's adm., 2 How, 282; Backus *v.* Richardson, 5 Johns., 476. See also Williams' Exec. *v.* Breedon, 1 Bos. and Pull. 329 (cited 2 How., 282), where a general verdict was amended because it appeared by the judge's notes that the jury calculated the damages in evidence applicable to the good count only. To same effect Union Turnpike Co. *v.* Jenken's, 1 Canes, 381; Livingston *v.* Rogers, 1 Caines, p. 588. Of course in the present case, the special count was good on its face, but, on the trial, its real viciousness appeared in view of the inadequate evidence, and yet the verdict has as much or more relation to it as to any other part of the declaration.

In Holt *v.* Scholefield, 6 Durnford & East., 691, the verdict was general upon counts partly good and partly bad. The Court of Kings Bench arrested the judgment in *toto*, and Lawrence J., said that "the plaintiff ought not to be at liberty to amend by this judge's notes in the case, because the evidence applied as well to the bad as to the good counts." See also Eddowes *v.* Hopkins, Dougl. 377.

III.

Even could the common counts be regarded as ground for introducing the alleged promissory note which was read on the trial, it was error of the trial court to admit the instrument,

without proof of its signature by Lambert N. Hopkins, the defendant below, as well as to allow interest at ten per cent. from date to be included in the verdict; and, although the Supreme Court permitted a remittitur of four per cent. interest from date of the alleged note, yet it erred in allowing six per cent. interest from such date; the instrument by its terms being payable four months from date and bearing interest only from maturity.

The mere statement of this proposition carries the demonstration of its validity. Had the special count described the instrument introduced in evidence, the statute already cited would have dispensed with proof of signature; but the statute does not extend to an instrument not described or specifically referred to in the declaration. We have already shown the inadequacy of the testimony to connect the defendant below with the execution of the paper. As to the subject of interest, the instrument introduced was a special contract to pay ten per cent. interest after maturity, that is, after the lapse of four months from October 1, 1881 (*Record*, p. 12.) The instrument did not import an indebtedness immediately payable. At best, it imported an inchoate, unmatured indebtedness, not payable until February 1, 1882, and an agreement executory in nature to pay ten per cent. interest from February 1, 1882, in case payment should be deferred after the specified day of payment. When parties mutually contract that on a certain future day a specific sum shall be payable from one to the other, they establish the limitations of the debt, and it is not within the legitimate scope of judicial power, to disregard the intent of the contracting parties by arbitrarily altering the terms of the contract to the detriment of one party and to the advantage of the other.

The Supreme Court of New Mexico decided (*Record*, pp. 25, 26), that the special count was unavailable; also that, in the absence of an interest count, interest could not be recovered as matter of contract, and therefore no regard could be had to the rate (ten per cent.) established by the parties; but, nevertheless, it felt itself at liberty, ignoring the special contract, to make for the parties a new contract under which the defendant below should be mulcted in six per cent. interest from the date of the alleged note. According to this judicial theory, when A promises on the first of October to pay B $1,000 on the first of

the following February, and to allow interest from such day of maturity, as a reward for any forbearance of B after that period, the law presumes an additional contract to have been made between the parties on the first day of October, by whose implied terms interest at the statutory rate (six per cent.) is to be deemed reserved from date. This strange theory is founded on the idea that a promissory note, payable four months after date, with interest at a special rate after maturity, is to be considered an account stated at its date, importing an immediate debt in the principal sum and the right of the creditor to have interest from that date as damages. A fair corollary would be that, the account being so stated, an immediate right of action arose, and therefore the creditor might sue at once in the life-time of the note.

This fallacy infects the reasoning of the court by which it attempts to support *pro tanto* the judgment of the District Court by the aid of the count upon an account stated. The court failed to distinguish between a promissory note already due and for a definite sum, and an instrument maturing *in futuro*, containing three promises, one certain and two contingent, namely, a promise to pay $1,314.65, in four months; a promise to pay current exchange between St. Louis, Mo. and Santa Fe, N. M., and a promise to pay interest, to be computed at a special conventional rate from the date of maturity until payment of the principal sum and exchange.

IV.

The alleged note so introduced in evidence being made at St. Louis and payable at Santa Fe four months after date with exchange and with a stipulation for ten per cent. interest to be calculated from maturity, lacks the fixed, certain and specific nature of an account stated or other executed contract. It imports a special contract executory in nature, one element, namely the ten per cent. interest after maturity, being always executory and another element, namely, "current exchange," being uncertain and fluctuating, and it is not appropriate evidence under the common counts. Whether the instrument be deemed non-negotiable according to the doctrine laid down in Russell *v.* Russell, 1 MacArthur, 263, and Lowe *v.* Bliss, 24 Ill. 168, or whether it be deemed negotiable according to other

weighty authorities, See I Daniel, Neg. Ins. § 54, it is nevertheless peculiarly out of the line of that class of contracts which is held to furnish evidence *per se* of an account stated or of other past pecuniary transactions, such as loans within the scope of the common counts; for here we have a special contract by whose terms the party promising undertakes to pay a certain sum by a given day, with "current exchange," and further undertakes to increase the sum after maturity by the addition of interest at the rate of ten per cent. to run until actual payment. No rescission of this special contract is suggested. It remained in full force at the time of the trial, for aught that appears to the contrary. The rate of interest was at its date the subject of conventional arrangement between the parties. It would, under the laws of New Mexico then existing, have been a legal contract if it had provided for interest at the rate of fifty per cent, or at any other rate however exorbitant, or if it had provided for various rates of interest, each applicable to a separate part of the time of forbearance. It was only in the absence of a special agreement as to interest that the rate after maturity would be limited by law to six per cent.

At the date of the instrument in question, the Territorial law (Act of 1872, Ch. 19,) provided, "no plea of usury shall be admissible in any of the courts of this Territory, and all contracts in writing, now made or hereafter made concerning the payment of money, shall be legal and binding according to the interest and meaning thereof."

Therefore, we insist, the contract was a continuing executory contract, as to which the parties expressed in terms what they meant and left nothing to legal implication.

It is only when a special contract is at an end, both as to the plaintiff's performance of his part as well as to the liquidation of the amount due, that *indebitatus assumpsit* lies. That form of action involves the present implication of the law upon a transaction wholly past. It never lies unless what is due because of an executed contract is ascertained and fixed. It is upon the ascertained and fixed amount of indebtedness that the law implies an undertaking to pay. But when in its nature the contract provides not for a sum certain, but for a

sum constantly growing during the indefinite future, at a rate not fixed by law but established by the contract itself, there is no point of ascertainment of the sum except the time of payment or the date of a verdict or judgment. But *indebitatus assumpsit* only lies when the amount is definitely fixed before the suit.

Holden v. Trust Co. 100 U.S. 72-74 also 110 U.S. 620.

The contract has an alternative or contingent aspect, but its executory operation continues up to payment or judgment and it is not completed or closed at any earlier stage. Its nature is well illustrated by Sutherland in his Chapter on "Interest" (1 *Suth. on Damages*, p.p. 531 to 561,) and particularly in the section relating to "agreements for interest until paid," p. 553 &c.

That the interest provided for is all part of the contract debt, as distinguished from interest allowed by law or at the discretion of a jury as damages will be made clear by reference to the cases next below cited.

Gibbs vs. Fremont, 9 Exch. 25.
Holden vs. Freedman's, S. & T. Co., 100 U. S. 72.
Wilkerson vs. Daniels, 1 Greene (Ia.) 179.

Without re-opening the old question as to when interest is recoverable as matter of common law, upon matured demands (See 1 Chitty Pl. 88, noted; 2 *Ib.* 357, 358,) it is submitted that there is a clear distinction between the legal nature of interest allowed by the law upon defaulted debts, in other words interest by way of damages, and that of interest expressly contracted for as an increment of the principal debt. This distinction becomes more marked in a case like the present, wherein a high rate of interest is stipulated for in case the principal debt should not be promptly paid. The contract seems to imply that, although a definite credit of four months is given, the alleged note shall at the lapse of that time be converted in effect into a *quasi* demand note upon which interest shall accrue as matter of contract at the rate of ten per cent. per annum until payment.

In such case, interest is not damages—not a mere legal incident—but it is a substantive part of the claim. As it accrues, it attaches to and becomes a part of the original debt, swelling its dimensions continually.

This principle was well understood and applied in Fake *v.* Eddy's Exr., 13 Wend 76, in which Chancellor Walworth deliv-

ering the opinion of the Court of Errors said (pages 79 and 80:) "The counsel for the plaintiff in error are wrong in supposing that the rule of law that an action cannot be sustained for the interest of a demand after the principal has been paid is applicable to this case. The cases of Tillottson *v.* Preston, 3 Johns R. 229, Johnson *v.* Brannan 5 Idem 268 and The People *v.* The Corporation of New York, 5 Cowen's R. 331, were all cases in which there was no contract for the payment of interest and it could only be recovered as damages for the non-payment of the principal debt when it became due. In such cases, if the party to whom the money is payable accepts the amount agreed to be paid,in full satisfaction of the principal debt, without requiring the debtor to pay interest from the time the debt became payable, he cannot afterwards maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest as well as the principal of the plaintiff's demand, I apprehend that the performance of one part of the agreement would be no bar to an action for the non-performance of another part thereof."

The peculiarity of the instrument in question is that it never ceases to operate as a continuing contract, until payment or judgment, and even after judgment, by the laws of New Mexico, it would continue to fix the rate of interest on the judgment.

It is provided, (*Compiled Laws*, § *1735*:)

> Judgments and decrees for the payment of money shall draw the same rate of interest with the contract on which they are rendered; and such rate, if other than six per cent., shall be expressed in the judgment or decree; no judgment or decree shall draw more than twelve per cent. interest.

On account of the rate of interest, being purely conventional and higher than the statutory rate (six per cent.), and of the continuing calculation of that rate, the contract is *sui generis* and not at all like ordinary interest bearing contracts known to the common law and, which, after maturity, furnish evidence under the money counts.

It is somewhat like an interest-bearing demand note which may run almost indefinitely without being deemed defaulted, (1 Daniel, Neg. Ins. §§ 608,610), but, unlike such a note, not even a demand of payment will liquidate the amount due so as to stop the continued conventional effect of the peculiar interest stipulation. On demand, an interest-bearing demand note becomes a definitely fixed liability for a specific amount, to-wit: the principal and accrued interest, and there would seem, on principle, whatever may be the precedents, to be no good reason why, from the time of the demand, the holder might not on the whole amount, principal and interest, as a debt fixed, insist upon interest as damages, notwithstanding the compounding necessarily involved.

See 104 U.S. at page 677.

In such a case, the note after demand might, with proof of the demand, establish an account stated, upon which interest ought to run as damages.

But in the case of a contract of constantly increasing amount, never definitely ascertained until actual payment or judgment, all the features of an open, continuing, executory contract appear, and, as to a contract of that nature, it is necessary to declare specially, instead of relying upon the common counts. Ordinary assumpsit, and not *indebitatus assumpsit*, is the proper form.

2 Green Ev. § 103.
Whiting vs. Sullivan, 7 Mass. 107.

Per Parsons, Ch. J.: "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration, because such declaration is repugnant to any implication of a promise."

Clark vs. Smith, 14 Johns, 326.
Robertson vs. Lynch, 18 Johns, 451.

where the court said:

"Where there is a count on a special agreement coupled with a general count for goods sold, the plaintiff may, undoubtedly, abandon his special count even after he has attempted to prove it and failed, and may then resort to his general count. But this can only be done when the proof is adapted to the general count. It can never be

allowed where the goods were, in truth, delivered under a special agreement, as in this case, and where the plaintiff might, beyond all question, sustain a proper count on the special agreement. A contrary rule would enable the plaintiff in every case, by mere volition, to convert a special contract into a general *indebitatus assumpsit*."

The English cases, as well as the best considered American cases, regard interest contracted for as part of the debt, and not as damages. (Watkins *v.* Morgan, 6 Carr & Payne,(25 E. C. L. R.) 661; Hudson *v.* Fawcett, 7 Mann. & Gr., (49 E. C. L. R.,) 348; Gibbs *v.* Fremont, 9 Exch. 25.)

Thus in Watkins *v.* Morgan, *supra*, it was held, in effect, that contract interest and damage interest are not convertible terms, and, therefore, in an action of debt, only the interest accrued during the life-time of the contract could be recovered, although the declaration, with a view evidently to the recovery of interest up to the time of the trial, stated the amount of principal and interest, *i. e.*, the debt, at a sum large enough to include such anticipated interest. Because, in the claim of damages, ten pounds only—the usual sum inserted in the *ad damnum* clause in declarations in debt—were asked, the court would not permit more than that sum to be recovered as damages, although it fell far short of the interest accrued between the maturity of the contract and the day of the verdict.

See also the elaborate opinion of Chief Justice Gray, reviewing the English cases, in Union Institution, &c. *v.* Boston, 129 Mass. 82

It would seem that a contract of continuing executory character ought always to be declared on specially. It remains as a *quaere*, whether the creditor on such a contract can waive the uncertain part—that is, the interest—and, declaring by the common counts for the principal sum only (as is held by the Supreme Court of New Mexico to be in effect the case here), can employ the contract as evidence, under those counts, of an account stated, &c., to the extent of that principal sum.

Could he do this, which we deny, still he must in such event, be deemed to waive as well all claim for damages. It is well understood that contract interest displaces all pretension to damage interest. The law of the contract is the substitute for

al legal implication. A creditor who, upon this theory, waives the contract interest, cannot recover more than the actual principal, and, in such case, it is error to permit him, while waiving voluntarily a part of the debt, to avoid, more or less, the effect of the waiver, by invoking a legal implication of damages which is only appropriate in the absence of an express agreement.

See note to Hudson *v.* Fawcett in 49 English Common Law Reports, page 349.

See, also, latter part of note to Mounson *v.* Redshaw, 1 Williams' Saunders, p. 201.

It is a principle of common law that a debt can not be split up in several parts, and that even the original creditor can not sue for a part without satisfying the residue. Thus in Hawkins *v.* Gardner, 12 Modern 213, the Court of King's Bench held that "if A. draw a bill of one hundred pounds payable to B., or order, B. cannot assign fifty pounds thereof, so as his assignee shall have an action for the same; and if B. himself brings an action for part, he must acknowledge satisfaction for the residue."

To the same effect, is Johnson *v.* Baynes, 12 Modern 84; Anonymous, *Ib.* 72: and Holt *v.* Samback, 1 Cro. 103, 104.

So, if part of an entire demand is sued for by a plaintiff and in the suit is either recovered or defeated, the residue is forever lost.

Guernsey *v.* Carver, 8 Wend. 492.
Miller *v.* Covert, 1 Wend., 487; and numerous cases there cited.

It follows that if the plaintiffs below could lawfully invoke such a special contract as proof of an *indebitatus assumpsit*, they could not make it available beyond the principal sum; for that was the only part which had become certain and fixed before the trial, and, besides *that sum only was stated in the common counts as the indebtedness upon which the alleged implied assumpsit arose;* and, further, all interest whatever (the same being the residue of the debt,) was lost, because excluded from the pleaded statement of the claim, and consequently no interest at all was recoverable, either as debt or damages, and the judgment was excessive to the extent of all interest therein included.

The kind of indebtedness upon which the law implies an assumpsit is always a completed demand, and never one simply

in fieri (2 *Green. Ev.* § 126.) The idea of interest was never associated with an implied assumpsit except as matter of damages.

To consider the indebtedness to which the legal implication attaches as carying a crescent interest by virtue of express contract is to disregard the fictitious nature of the legal implication and suggest a mongrel contract partly implied, partly expressed.

Originally, it was held that an account stated would not in general carry interest even as damages. (2 *Tidd's Pr.* 872.)

While interest was permitted as damages on bills of exchange and other pecuniary contracts, it was not treated as matter of conventional right, but as matter wholly subject to the discretion of the jury. (2 *Tidd's Pr.* 873.)

But interest, by way of damages, was never permitted when a creditor entitled to interest as part of the debt by force of his contract saw fit to waive that part of his contract.

We insist, however, that the plaintiffs below could not control the form of action by the expedient of splitting their demand.

It will be observed that the common counts lay the *indebitatus assumpsit* as of October 1, 1881, (the date of the alleged note.) In no point of view could the implied assumpsit arise until after the expiration of the term of credit. (2 *Greenleaf's Evidence* § 104.) that is, February 1, 1882.

Properly the time should have been laid as of February 1, 1882, or a later day, and it is perhaps still a doubtful question whether a common count can be sustained which so seriously mis-states the day of the alleged *indebitatus*.

Selwyn (*Nisi Prius*, Vol. 1, page 107,) says: "The day mentioned in the declaration on which the cause of action is stated to have accrued, is not material, provided it be a day after the cause of action accrued and before action brought."

The pleader, if he intended to rely on the writing as evidence under the common counts, well knew from the writing itself on what day the credit expired and the implied assumpsit, if any, arose, and that the production of the writing was necessary to prove the implied assumpsit at a day certain. (*i. e.* February 1, 1882.)

While, as stated by Gould, (*Pleading*, Ch. 3 § 63,) "where the day is not material in evidence, it cannot be so in pleading," yet the converse ought to be true, where, as here, the day is material in evidence because part of a writing necessary to prove the gist of the declaration. In the following section 64, Gould says:

"The precise day on which a material fact alleged in the pleadings took place is in most cases immaterial, except when the date of a record or other writing, or *some other fact, the time of which must be proved by a written instrument*, is alleged."

Manifestly the time of the alleged *indebitatus assumpsit* was to be proved precisely by the writing. Chitty, while suggesting the general immateriality of the averment of time, does not consider this precise question, but advises as "usual and proper," in the common counts, "to lay the day after the bill was due or other special cause of action was complete." 1 *Ch Pl.* 341, note U. See Vail *v.* Lewis, 4 Johns, page 457.

The writing introduced in evidence may on this ground be regarded as variant and irrelevant under the common counts as well as under the special count, and it was introduced after due objection and exception.

The writing in question being offered and admitted over objection and exception to prove the special count, and the Court insisting on its erroneous ruling, it must be presumed that the verdict was directed by the Court under the influence of this error. The writing could not be admitted to prove two separate and inconsistent propositions. The verdict could not pass on the special or express contract and also on a supposed implied contract derived from and substitutionary of the express contract.

Such duplicity of procedure is never tolerated either in pleading or on the trial.

Theoretically, every count states a new contract. Practically, this theory must be regarded at least to the extent of not introducing and submitting to the jury identically the same evidence to prove two distinct counts. While, under the common law sytem of procedure, alternative use may be made of the same proofs, so that, when they appear irrelevant or insuf-

ficient to prove the count in respect of which they are offered, they may still be applied to another count to which they are appropriate, it is never competent, when they are admitted by by the Court to prove a particular count, to employ them to prove another, unless the first count be abandoned. So, in the precedents, it will be found that, where a declaration sets up a contract by special count and a writing is introduced to prove the averment, the writing is not applied to the common counts, unless the Court has refused to admit it to the special count, or unless the special count is abandoned on the trial. The use of such proof may, we repeat, be alternative, but never can be double.

10 Johns. 418. Sculll v. Roane Hemp. C.C.R. P. 104.

Frequently the practice is in harmony absolutely with the theory, as in cases wherein the pleader, in addition to a note or other special contract, specially declared on, seeks to recover on other actual contracts intended to be embraced in the common counts. In such case proof may of course be offered as to all the separate claims, and a verdict may pass for all sums so proved. But when on the trial, the p aintiff deems best to prove the special contract (in a proper case) under the common counts, instead of relying on the special count, he must make his election on the trial; since *indebitatus assumpsit* involves the subordination of the express contract to a legal implication. The maintenance of one alternative proposition is the suppression of the other. Both cannot be maintained and submitted to a jury on the same trial. The substance is protean and may appear in either form; but it cannot appear in both forms at once.

These propositions are consistent with cases, which may be found, in which proof was offered generally on the trial, and competent, when offered, to prove one of the issues, and the verdict was made to conform to the proofs.

V.

The verdict as recorded is void for uncertainty, not being for a specified sum in dollars or other money, and no judgment could lawfully be entered thereon.

See the verdict as recorded. (Record p. 6.)

This may be the misprision of the clerk, but in this court the record imports verity in every part.

Bacon's abridg. "*Verdict*," E.

VI.

The appeal from the District Court to the Supreme Court of New Mexico being prayed and allowed in vacation and not in term time was void as a technical appeal, even though the Supreme Court gained jurisdiction to review the judgment by virtue of its general appellate power, and the appearance of the parties. Hence, that court, even if it has the power, upon a technical appeal, to give judgment in a proper case against sureties on an appeal bond, could not invoke that summary power under the circumstances. In New Mexico appeals are regulated by statutory provisions, among which are the following:

(Compiled laws, sections *infra*.)

"§ 2186. *No such appeal shall be allowed* unless, first, the appeal be taken *at the same term* at which the judgment or decision appealed from was rendered; and second, unless the appellant or his agent shall, *during the same term*, file in the *court* his affidavit stating that such appeal is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

"§ 2187. Upon the appeal being made, the *District Court* shall make an order allowing the same; such allowance shall stay the execution in the following cases and no others:

First, when the appellant shall be executor or administrator, and the action by or against him as such; second, when the appellant or some responsible person for him, together with two sufficient securities, to be approved by the *court*, during the *same term* at which the judgment or decision appealed from was rendered, enters into a recognizance to the adverse party in a sum sufficient to secure the debt, damages and costs recovered by such judgment or decision, together with the interest that may grow due thereon, and the costs and damages which may be recovered in the Supreme Court; conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, and that if the judgment or decision appealed from be affirmed, or the appeal be dismissed, that he will perform the judgment of the District Court, and that he will also pay the costs and damages that may be adjudged against him upon his appeal."

We have italicized certain words in the above quotation, indicating that all the proceedings upon appeal are court proceedings to be had during the same term at which the judgment appealed from was rendered, and, therefore, that a judge in vacation cannot receive the necessary affidavit, or allow an appeal, or approve a *supersedeas* bond.

Consent of parties could not confer on a judge in vacation the powers of the court in term. Yet, in the present case, pursuant, apparently, to a stipulation of attorneys, (Record, pp. 8, 9), all the proceedings upon the pretended appeal were had after the lapse of the May term, A. D., 1882, before the judge in vacation. (Record pp. 9, 10 and 11). There was, therefore, no appeal, in a technical sense, and no stay of execution. The *supersedeas* bond was either absolutely void, or else was merely a common law obligation available in a suit at common law against the sureties but not available as ground for invoking the pretended statutory power (considered *infra*, Point VIII.) of the Supreme Court to give summary judgment against sureties upon affirmance of the judgment of the District Court.

Kountze vs. Omaha Hotel Co., 107 U. S. 378, 396.

VII.

If the Supreme Court has, in any case, statutory power to give judgment against sureties on appeal, that power can be exercised only when the judgment rendered by that Court proceeds on grounds indicating a breach of the condition of the *supersedeas* bond. The statutory provision relied on as granting such power is to be construed and limited by the other statutory provision regulating the form and condition of the bond.

This alleged statutory power will be considerd more at length in Point VIII.

It depends on a section of the *Kearney Code* which appears in the *Compiled Laws* as follows:

> § 2206. In case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond.

The *Kearney Code* was promulgated by General Kearney in 1846, and a copy of it will be found as a prefix to the *Compiled Laws* of 1884. (See *Compiled Laws*, page 99, § 5)

In the same Code, originally appeared the statutory provisions, above quoted, on the subject of appeals. (See *Compiled Laws*, page 94, § 10, 11)

It is not questioned that the legislature may constitutionally provide for a summary judgment by the appellate court against the sureties when the action of the court upon the judgment appealed from demonstrates the breach of the condition of the bond. This proposition is sustained in the opinions in two cases in this Court, arising in New Mexico, namely, Beall *v.* New Mexico, 16 Wall. 535, and Moore *v.* Huntington, 17 Wall. 417; but, since, in both those cases this Court reversed the judgment and decree of the Supreme Court of New Mexico, because of serious errors committed by both the District and Supreme Courts of the Territory against the defendants below, there was no occasion for this Court to consider minutely or to construe definitively the New Mexico statutes now in question. Indeed, the opinions referred to merely assume that there are statutes justifying the Supreme Court of New Mexico in awarding judgment against sureties on appeal in certain cases, and proceed to consider the constitutionality of such legislation. But it was not pertinent to the decision nor the purpose of the opinion, in either of the cases, to construe those statutes and define the limits of their operation.

The statutory rquirements of an appeal bond are quite plain. Express provision is made respecting the condition to be inserted in every such bond. The bond is intended to be a contract importing upon its face the limits of its obligation. It would be absurd in the same law to provide for such contract and further to provide that, notwithstanding its terms, it should be within the power of the Supreme Court, by a summary judgment, to hold the sureties to a higher degree of responsibility than that to which they would be subjected in an action at common law to recover upon a breach of the condition of their bond.

The courts ought not to tolerate such absurdity of statutory construction. The provisions respecting the form and condition of appeal bonds are too certain and specific to be done away with by mere construction of a general and somewhat doubtful statute on another subject. *Expressio unius est exclusio*

alterius. Unless, on grounds hereinafter presented, the court shall hold that the statute permitting a summary judgment against sureties has no application to appeals from the District Court, the common canons of construction call upon it so to construe the apparently conflicting provisions that they may all stand together, and, so construing them, no power can be conceded to the Supreme Court of New Mexico to render judgment against such sureties, unless the judgment against the appellant is of such a nature as, *ipso facto*, to import a breach of the condition of their bond, in an action against them at common law.

The statutory phraseology in the section regulating appeal bonds is not strictly grammatical, but it plainly intends that a breach shall be deemed to happen only when the judgment appealed from is affirmed or the appeal dismissed; and neither of these contingencies has occurred in the present case. It is only when one of these conditions is broken that the sureties are bound to respond, and then the measure of their responsibility is to see that the appellant shall "perform the judgment of the District Court" and "also pay the costs and damages that may be adjudged against him upon his appeal."

The "damages" referred to are (see bond, page 10, Record), according to the law of New Mexico, only damages in the nature of costs, such as this court is authorized to adjudge in case of unfair delay. The statutory provision on the subject is (Compiled Laws, § 2191, also page 95, § 15.)

"And upon the affirmation of any judgment or decision, the Supreme Court may award to the appellee or defendant in error, such damages, not exceeding ten per cent. on the amount of the judgment complained of, as may be just."

Manifestly, "affirmation" here means affirmance of the entire judgment, and the "damages" intended are, not the amount of the affirmed judgment or any part thereof, but an increment of that amount. This provision affords strong evidence in support of our contention that the affirmance of a judgment, within the meaning of a *supersedeas* bond, in New Mexico, is the affirmance of the whole judgment, and not the modification of that judgment by a reduction in the appellant's favor.

To these considerations, we may add that the result in the Supreme Court of the appeal was favorable to the appellant, rather than against him. He protested against the judgment of the District Court as unjust. The appellees sought to uphold that judgment in its entirety.

The Supreme Court decided to reverse the judgment, unless the appellees would concede it was unjust by remitting an unlawful excess. Surely this was a success for the appellant and a defeat for the appellees—a gain to him, a loss to them. His sureties did not stipulate to pay in such an event.

VIII.

The power of the appellate court to give judgment, as of course, against sureties on appeal bonds ought to be confined to cases of appeal from inferior courts.

In the note to Moore *v.* Huntington (17 Wall, page 420), we find a suggestion by able counsel to the effect that the above cited provision in the Kearney code (Compiled Laws, page 99, § 5, also § 2206), had reference only to appeals from inferior tribunals.

The phraseology of the provision is somewhat general, but the court will observe that it originated in the Kearney code, where it occurs among divers other provisions, clearly referring merely to proceedings in the courts of alcaldes and prefects. *Noscitur a sociis* might well be applied.

It is especially adapted to cases wherein the appellate court tries the issue *de novo*, as occurs in New Mexico upon appeals from justices' courts and probate courts.

The Kearney code provided for such trials *de novo* (Compiled Laws, page 99, §§ 3, 4). It is still the rule (Compiled Laws, § 1848; act of January 12, 1852).

"All appeals from inferior tribunals to the Probate or District Courts, shall be tried anew in said courts on their merits, as if no trial had been had below." This is the literal phraseology, although in the compilation of 1884, the compilers unlawfully assuming the functions of revisers, undertook to eliminate the words "Probate or," in view, probably, of the doctrine of Ferris *v.* Higley, 20 Wall, 375.

It is frequently a perplexing thing to determine the precise state of the law in New Mexico on certain subjects, because of the existence of conflicting systems of jurisprudence as well as sporadic statutes, which illustrate how ignorance can baffle learning.

At the base of our jurisprudence lay the civil law as understood in Mexico.

Upon that was engrafted the Kearney Code in 1846. (See *Leitensdorfer* vs. *Webb*, 20 How, 176). Then followed the organic act of 1850, and the numerous Legislative enactments which have ensued. In 1878 the common law system of pleading was sanctioned by a mandatory statute. (Compiled Laws, § 1907). In 1876 the common law was made the "rule of practice and decision, (Compiled Laws, § 1823). In 1865 there was a revision or approved compilation of laws, wherein appear several contradictory statutes. (Compiled Laws, §§ 2615, 2618). In 1884 the laws were again compiled without the effect of a revision.

It is believed that the present compilation contains provisions no longer in force, and omits others that have not been repealed, although it is substantially correct.

In view of the incongruous state of our statutory law, we submit, that, so far as practicable, the courts should struggle by construction to harmonize apparent conflicts of language and educe, in the general spirit of the several statutes, as high a degree of certainty and as large a measure of justice as possible.

We suggest that the provision of the Kearney Code (Compiled Laws, page 99, § 5; also § 2206,) as to judgments against sureties on appeal bonds, not only related originally to appeals from alcaldes and prefects, but that it was by implication repealed and supplanted by an enactment (found in Compiled Laws, § 2395,) that "In all cases of appeal from a justice court, if the judgment of the justice be affirmed, or if on the trial anew in the District Court, judgment be against the appellant, such judgment shall be rendered against him and his sureties on appeal bond."

This first appeared in an act relating to justices of the peace, passed January 9th, 1852, (See Revised Laws of 1865,

page 162, § 86), and it seems to us to be a re-enactment, in modified and limiting form, of the old provision (Compiled Laws, § 2206).

The incongruity of previous provisions found in the Kearney Code, and the inconsistency between the condition of a *supersedeas* bond, on appeal, with a summary jurisdiction over sureties in the appellate tribunal, furnish cogent reasons for imputing a repealing effect to this act of 1852.

It will be observed that the supposed authority of the Supreme Court to render a summary judgment against such sureties is confined to cases of appeal. Even the Kearney code recognized writs of error (Compiled Laws, pages 94, 95, §§ 13, 14), and they were authorized expressly by the Organic Act. While, in the Territory of New Mexico, judgments at law and decrees in equity have been always reviewable by appeal, yet the Supreme Court has always had concurrent jurisdiction, in cases at law, to issue writs of error. Until the statute of 1880, below cited, the Supreme Court, on writs of error, provided for *supersedeas* bonds. In 1880 (Compiled Laws, §§ 2193, 2194), the following provisions, still in force, were enacted:

"All causes, either in law or equity, finally adjudged or determined in the District Courts, may be removed into the Supreme Court of the Territory for review, either by appeal or writ of error.

"Appeals shall be taken and allowed as now provided by law.

"The clerk of the Supreme Court shall issue a writ of error to bring into the Supreme Court any cause finally adjudged or determined in any of the District Courts, upon a praecipe therefor, filed in his office by any of the parties to such cause, his attorney or solicitor, at any time within one year from the date of such judgment or determination, and giving security for costs therein to the satisfaction of the clerk.

"But there shall be no *supersedeas* or stay of execution upon such judgment or determination, unless the party applying for such writ of error, or some responsible person for him, shall, within three months from the date of such judgment or determination, execute a bond to the adverse party in double the amount of the judgment complained of, with sufficient sureties

to be approved by such clerk, conditioned for the payment of such judgment and all costs that may be adjudged, in case such writ of error shall be dismissed or the judgment or determination of the District Court affirmed."

No argument is needed to show that these provisions for a supersedeas on writ of error, enacted in 1880, are the counterpart of the provisions for a *supersedeas* on appeal, promulgated in 1846. No ingenuity can domonstrate that the old provision, above cited, declaring that "in case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond," is applicable to a proceeding by writ of error or against sureties upon a *supersedeas* in error.

It would be a great anomaly in the law of procedure, if the mere mode of securing a review by the Supreme Court, should determine not only the power or want of power of that court over sureties, but also the rule of construction to be applied to the condition of a *supersedeas* bond.

The condition is substantially the same in a *supersedeas* bond, in the case of an appeal, as well as in that of a writ of error. Each imports the same legal obligation. The same rules of evidence and the same measure of damages would be applied to each in the trial of an action of debt founded thereon. Imbecillity should not be imputed to legislators, if the imputation can be avoided by reasonable construction of their enactments.

Egress from the dilemma is found either in holding that the Supreme Court of New Mexico has no power to render judgment against sureties on appeal, or in holding that its power in that respect is limited by the terms of their contract.

IX

At all events, the condition of the *supersedeas* bond in this case, was never broken.

The judgment of the District Court was not affirmed within the meaning of the condition.

The sureties assumed a liability only in case either "the judgment or decision appealed from be affirmed, or the appeal be dismissed," (*Record*, p. 10,) and that liability, if it should oc-

cur, was, to be responsible, not for a judgment (except for costs and statutory "damages") of the Supreme Court, but for the identical "judgment of the District Court" appealed from.

It is well held by the Court of Appeals of Kentucky that such a condition is not broken by a *partial* affirmance of a judgment. As said in the case of Feemster v. Anderson, 6 Monroe, 537, 540, "We cannot suppose it was the intention of the legislature to compel litigants to purchase justice at so dear a rate as to compel them to give bond with surety for all that remained, if a cent was left due, although they are driven into appeals to get clear of demands in part unjust. * * * The right of appeal is given on the supposition that judgments may be given unjustly, in whole or in part, and to correct that injustice, whether partial or total, was the design of the appeal, and if by the appeal the correction takes place then the appellant is not cast in the sense intended. * * * This construction of the act will give to appeal bonds of this nature the same effect as is given to appeal bonds taken in cases brought to this court from inferior tribunals, in which, if the appellant succeeds in lessening the demand, and in but a partial reversal, he saves his bond and the condition is not broken. Testing this bond by this construction of the act, it is valid, as it embraces in its condition every event on which the bond, if taken in the general terms of the act, could have been forfeited; that is the confirmation of the judgment or the dismissing of the appeal."

By the strict rule of the common law, which formerly obtained, a judgment infected with error was always reversed upon writ of error, a *venire de novo* being sometimes granted.

Bacon's Abridg. Error, M.

Later, the practice grew up in some appellate courts, to reverse the judgment when excessive, and direct the court below to permit a remission of the excess. In such case, no possibility of liability on the part of the sureties on the *supersedeas* has been suggested. The result, if the remission be made, is the act of the interested creditor rather than of the court. It is a personal voluntary concession, rather than the authoritative command of a judicial tribunal.

Still later, the appellate courts would directly receive from the judgment creditor a remission of the excess and directly modify the judgment as in this case.

But no matter in what mode the appellate court may act, upon the disclosure of an excess in amount impugnable as error, in every such case the judgment below, in form and substance, is disapproved, unsustained, unaffirmed. So far as appellate power under the common law extends in such case, the judgment cannot be modified; it must be reversed. Left to itself, the appellate court can regularly only reverse.

But, under the innovation sanctioned in this case, the appellate court, unwilling or incompetent to reduce a judgment, may bargain with the creditor, and, if the creditor will deliver a consideration by relinquishing a part of his pretensions, may declare him entitled to the remainder; under the caution, however, that if he declines the opportunity, the whole judgment will be reversed.

In the present case, if the judgment was affirmed in part, it was equally reversed in part. Indeed, the judgment *nisi* was a total reversal, (*Record*, p. 20.) Sureties are *strictissimi juris*. When they agree to pay on condition that a judgment complained of shall be sanctioned, approved, and affirmed by a higher court, they do not mean to pay, if that court, joining the sureties in criticism of the impugned judgment, declares it to be justly complained of, disapproves it, and disaffirms it, and threatens to destroy it utterly unless the creditor will consent to destroy it in part. To "affirm" a judgment is to "confirm" it—or, in the language of lexicographers, "to put it past doubt by new evidence; to corroborate it; to settle it; to establish it; to fix it; to strengthen it."

The statutes of New Mexico imply that an "affirmed" judgment is not a *modified* judgment.

In one place (Compiled Laws, § 2190) it is provided: "The Supreme Court in appeals or writs of error, shall examine the record, and on the facts thereon contained alone shall award a new trial, reverse or affirm the judgment of the [District] Court, or give such other judgment as to them shall seem agreeable to law." Here "reverse" and "affirm" are used as antithetical terms. A modification, or a reversal or affirmance

in part only, would be "such other judgment," provided that it be given, not according to mere discretion, but according to the laws of the land.

In another place, (Compiled Laws, § 2191, already cited *supra*), the right to award damages not exceeding ten per cent calculated on [the *whole* not a *partial*] "amount of the judgment complained of," is dependent "upon the affirmation" of the judgment. It is too plain for argument that this means an absolute affirmance.

Again, the "affirmance" of the judgment complained of renders the sureties liable to pay, not only that judgment, but also the "costs and damages that may be adjudged against the appellant upon his appeal." (*Ib.* § 2187.) The bond contemplates a judgment that will entitle the appellee to costs. Yet it is (notwithstanding the present anomalous case), a rule of almost universal application, that an appellant or plaintiff in error who succeeds in correcting a judgment on review, shall be entitled to costs in the appellate court.

Strongly corroborative of these views and of the doctrine of the Kentucky Court of Appeals, are the terms of the several codes of procedure and other statutes, in those States wherein the policy is adopted of requiring, as a condition of a stay of execution, security for the payment of whatever the appellate court may approve in the original judgment. Invariably, it is provided in such States, that the condition of the *supersedeas* bond or undertaking shall be, "if the judgment appealed from be affirmed in the whole or in *part*," &c., to pay the judgment or the *part* so affirmed, &c.

The solicitude shown in this classs of statutes to provide for the case of an affirmance in part only is very persuasive ground for the suggestion that, in the absence of such express provision for security for a part as well as the whole, the words "affirmed" or "affirmance," as applied to a judgment would be taken as signifying an entire and absolute affirmance.

So, the usual clause in the condition of a *supersedeas* bond providing against a dismissal of the appeal or writ of error, is introduced because sureties are *strictissimi juris*, and such a

dismissal would not be construed against them as equivalent to an affirmance of the judgment, although it would amount to the same thing in practical effect.

The New York Court of appeals, so holding in Drummond *v.* Husson, 14 N. Y. 60, said, (*Per Selden*, J. P. 63:)

"But the question here is not merely what was the intent of the legislature, but whether the engagement entered into by the defendants has been broken. The terms of the defendants' undertaking are specific to pay in the event that judgment appealed from should be affirmed in whole or in part. This event clearly has not occurred, and I am not aware of any authority for putting a construction upon this undertaking entirely different from that which its language imports. These defendants are sureties, and it would be unprecedented and contrary to all ordinary rules to enlarge the obligation of parties standing in that relation, by a latitudinarian and strained construction of the terms of their engagement."

X.

The Supreme Court in addition to its errors in failing to reverse the judgment of the District Court, in giving judgment against the sureties, and in allowing interest from date of the alleged note, erred in allowing costs.

This is contrary to the settled practice of appellate courts, in cases wherein the appellant or plaintiff in error is held entitled to any relief whatever; for no man ought to be mulcted for his effort to correct judicial error, when the effort is substantially successful. The court below says, in effect, you have been wronged by the District Court; you have a right to demand relief in the Supreme Court; we will grant you relief; but we fine you because you did not submit to the erroneous judgment.

XI.

Substantial justice has not been done. The defendant below pleaded payment, but the reliance of the plaintiff below on false ground, to wit, the variant instrument, induced the defendant below to refrain from proof on his part and to insist on the manifest variance. The trial was infected with serious error. The court ought to have directed a verdict in his favor and left

the plaintiffs below to a new action in proper form. The subsequent ingenuity of the Territorial Supreme Court has only tended to unnecessary delay, expense, and confusion.

We submit that, inasmuch as the defendants in error could not make their proofs available under the present declaration, the judgments should be absolutely reversed.

JNO. H. KNAEBEL,

Counsel for Plaintiffs in Error.

4-5.
124-510

Supreme Court of the United States.

HOPKINS ET AL.

vs.

ORR ET AL.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

O. D. BARRETT,
Of Counsel, &c.

Judd & Detweiler, Printers.

Supreme Court of the United States.

HOPKINS ET AL.

vs.

ORR ET AL.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

It is submitted that this case is within the rule of decision of this Court in the case of—

Maryland *vs.* Baldwin, 112 U. S., 490.

In that case Mr. Justice Field, in delivering the opinion, said:

"A general verdict upon distinct issues raised by several pleas cannot be sustained if there was error as to the admission of evidence or in the charge of the court as to any one of the issues."

If it be question in the case at bar that the issues are not distinct like those in the Maryland-Baldwin case, we reply, in the language of Mr. Chitty on Pleadings, as follows:

Counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts, and such counts are to be allowed."

1 Chitty on Pleadings, 415.

At common law a general verdict and judgment upon several counts in a civil action must be reversed on writ of error if only one of the counts was bad.

V. Case of Bond *vs.* Dustin, 112 U. S., p. 609.

Whenever this Court has held otherwise it has based its decision on a State law ruling the case, as in Bond *vs.* Dustin, 112 U. S., 604, or that the action was *quasi* criminal as in the case of Clifford *vs.* The United States, 112 U. S., 216; V. Clifton *vs.* U. S., 242.

Can there be any substantial difference between holding that a general verdict on several counts, among which one is bad, cannot be sustained, and holding that a general verdict on several distinct good counts cannot be supported in case illegal evidence, under exception, is given to the jury, the legal evidence not being sufficient to sustain a verdict on each count?

In this case the verdict was not *general* in the full acceptation of that term. The jury found for the plaintiffs in a specific sum, the exact amount shown by the *parol evidence* to be due on the note sued on, to wit, $1,399.48. (R., pp. 6 and 13.)

If the jury had properly found for the plaintiffs on the common count their verdict would have been for $1,338.97, principal, and interest at 6 per cent. from February 1, 1882; and if under the common count it was proper to compute the interest from October 1, 1881, the date of the note, then their verdict would have been for $1,365.26.

The jury thus having rendered their verdict in accordance with the evidence as to the amount the plaintiffs were entitled to under the special count, and that being a larger sum

than they could claim under the common count, the legal effect of the verdict must be the same as if the jury had by apt words limited their finding to the special count.

We know of no authority ever having been vested in a court proceeding under the forms of the common law to amend the verdict of a jury which they had specifically or by implication limited to one issue so as to transfer to another and different issue.

But we respectfully submit that this verdict could not be sustained even had the jury, by apt words, limited it to the common count, and had rendered it for the principal of the debt and interest thereon at six per cent. per annum from the maturity of the note.

There is no evidence in the case proving or tending to prove that the witness to whom it is said defendant acknowledged an indebtedness and promised to pay was the agent of the plaintiffs or either of them.

On this subject of admission Mr. Greenleaf lays down the rule as follows:

"Admission, however made, in order to constitute an account stated must have been made to the opposite party or his agent."

2 Greenl. Ev., 128.

In the case of Bishop *vs.* Chamber (3 C. and P., 55) suit was brought on a promissory note and, as appears from a question addressed to Lord Tenderden, and from a rule granted by the court, that the declaration contained a count on an account stated.

The note had been altered, so no recovery could be had on it. A third party testified that "he called on the defend-

ant and showed him the note, when the defendant said, 'I know I owe Mr. Bishop money; I wish you had applied sooner; * * * I have no doubt it is all correct and I will send the money.'"

Lord Tenterden held "that the evidence in this case is not such as to entitle the plaintiff to recover on anything but the note."

Verdict for defendant.

Also V. 1 Saund. on Pl. and Ev., p. 47, and authorities there cited.

On these authorities, and we know none to the contrary, the alleged admission and promise made to the witness, W. B. Childers, go for nothing.

The judgment of the Supreme Court, though by that Court called an affirmance of the judgment of the court below, was in fact a new judgment of the higher court.

The judgment of the lower court was for the principal of the note	$1,314 65
And interest thereon at the rate of 10 per cent. per annum, from the date of the note, 7 months and 21 days	84 33
Amounting to	1,399 48

Notwithstanding the fact that the promissory note did not call for interest till maturity, February 1, 1882 (no days of grace in N. M.).

If a remittitur was to have been entered, it should have been for all the interest from date of note till maturity and for four-tenths of the interest allowed after maturity, mak-

ing $50.51, and the judgment on affirmance should have been for $1,338.98, with interest thereon at the rate of 6 per cent. per annum *from the date of* the judgment affirmed; instead of which the Supreme Court rendered a judgment for the principal increased by 6 per cent per annum interest thereon from the date of the note till the date of the judgment of the higher court, amounting to $1,502.63, and this judgment would commence to draw interest from its date.

Thus the Court tried the case *de novo*, and on their view of the legal effect of the evidence entered judgment without any regard to the findings of the jury. It was therefore their judgment, and was not in fact an affirmance of the judgment below or of any part of it. The judgment below was not even set aside. There are, therefore, two judgments now in the case.

The plaintiffs in error sue out the writ of error averring that a manifest error has intervened, and the writ is of the same tenor.

The defendants in error are supposed to deny this averment. The plaintiffs are supposed to join issue thereon. If the Court finds any error it supports the averment of the plaintiffs in error, and when that has been done the writ has been prosecuted with effect, saving and fulfilling the condition of the bond.

If the plaintiffs below can avoid this by remitting the results of the error of the court below, then the effect is that the plaintiff in error must show that each and every proceeding in the court below was erroneous, in order to support his averment of error and to satisfy the condition of his bond.

The mere statement of this doctrine is the best argument for its refutation.

The court accept a remittitur and affirm the remainder, but in such case the practice is to do it without costs to defendant in error and without liability to sureties.

O. D. BARRETT,
Of Counsel, &c.

124-510

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 140.

LAMBERT N. HOPKINS, THOMAS B. CATRON, AND WILLIAM T. THORNTON, PLAINTIFFS IN ERROR,

vs.

WILLIAM C. ORR AND DE COURSEY B. LINDSLEY.

In Error to the Supreme Court of the Territory of New Mexico.

BRIEF OF DEFENDANTS IN ERROR.

W. B. CHILDERS,
HENRY WISE GARNETT,
Attorneys for Defendants in Error.

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In Error to the Supreme Court of the Territory of New Mexico.

BRIEF OF DEFENDANTS IN ERROR.

On reading the record in this cause the Court will find it unnecessarily voluminous, and were it not for the fact that plaintiffs in error have assigned fifteen grounds of error, most of which are raised in this Court for the first time, defendants in error would have contented themselves with citing the two opinions of the court below, which are printed in the record on pages 23 to 29, inclusive.

These opinions state the case and all the points raised in

the district court and also in the supreme court of New Mexico, and fully sustain the judgment of the court below.

This suit is an ordinary suit in assumpsit for the collection of a debt. It was brought in the district court for the county of Valencia. The defendant, L. N. Hopkins, voluntarily entered his appearance; and thereafter the venue was changed to the county of Bernalillo, as the record states. Thereafter the defendant filed two pleas to the declaration; one was non-assumpsit, the other payment. On the first plea the ~~defendants~~ Pefts joined issue; to the second they replied denying the plea, and to this replication the ~~plaintiffs~~ Pffs did not reply.

Upon these pleadings the cause came on for trial. The first count was on a promissory note, without alleging that the note was payable at any particular place. It alleged that the rate of interest it bore was ten per cent. It did not allege that the note was payable with exchange.

Then followed the usual common counts for goods, wares, and merchandise, for money lent and advanced, paid, laid out, and expended, for money had and received, and a count for an account stated.

Upon the trial plaintiffs offered in evidence a promissory note made by the defendant, as described in the first count of the declaration, except that the note was by its terms payable with exchange at First National Bank of Santa Fé, New Mexico. A copy of this note was filed with the declaration, as required by the New Mexico statute.

See Section 1921 Compiled Laws of New Mexico, 1884.

The next section provides that when so filed, as

this note was, "the execution thereof shall be admitted, unless denied under oath, in a pleading or writing filed in the cause within the time allowed for pleading."

The defendant objected to the introduction of this note in evidence upon the ground that there was a variance and that it was "otherwise improper and incompetent as evidence and did not sustain plaintiffs' declaration," and that there was nothing at the trial of said cause or in the files to show that it was the note sued on.

The court admitted the note, and defendant excepted.

A witness was also introduced, who testified that he had presented the note to the defendant and asked payment of it; that defendant admitted the debt and promised to pay it; but had failed to do so; that witness had computed the interest on the note; that the total amount, principal, and interest was $1,399.48.

To all of this evidence the defendant objected upon the general grounds that it was immaterial, incompetent, and improper.

This was all the evidence on either side.

The court instructed the jury to find for the plaintiffs.

See Record, pages 12 and 13.

The verdict was for $1,399.48, the full amount, the interest being calculated at the per cent. as expressed in the note. This trial and other proceedings took place on the 23d day of May, A. D. 1882, the 20th day of the term.

Defendant filed a motion for a new trial, and in arrest of judgment upon the same general grounds of objection to evidence he had made at the trial.

The court overruled these motions, and the plaintiffs appealed to the supreme court of the Territory, giving a supersedeas bond.

The condition of the bond was in accordance with Section 2187 of the Compiled Laws of New Mexico, "that if the judgment be affirmed he will perform the judgment of the district court. * * * And that he will also pay the costs and damages that may be adjudged against him upon his said appeal."

See Record, page 10.

The case was docketed in the supreme court of New Mexico, at the January term, 1883; argued and submitted, the court taking it under advisement, on the 14th of October, filed its opinion, holding that the note was inadmissible in evidence under the general count, but was admissable under the common counts, especially under the count for an account stated, but that the plaintiffs' judgment was for $1,399.48 when the amount claimed in the general counts was only $1,314.65. The judgment was for too much; and further ordered that the plaintiffs have until the second Monday in January, 1884, to file a remittitur, and that if done within that time the judgment be affirmed as to the residue, and upon failure so to do the judgment be reversed and remanded for a new trial.

See Record, pages 23 to 27.

Afterwards, at the January term, 1884, of said court, the plaintiffs filed the remittitur as indicated in the opinion of the court, and moved the court to affirm the judgment as to the residue, and for execution against the defendant and the sureties on his appeal bond.

See Record, page 15.

Upon this motion for judgment and execution against the sureties on the appeal bond argument was had, and the

court, having taken it under advisement on the 19th day of February, being the 19th day of the regular January term, rendered an opinion sustaining said motion for affirmance as against both the defendant and his sureties, and rendered judgment accordingly.

See pages 16 and 27 of the Record.

This is the only judgment rendered in the cause by the supreme court of New Mexico, and a statement of the case would seem to be sufficient in itself.

Plaintiffs in error, however, have managed to array fifteen grounds of error that look quite formidable if there was anything in the record on which to predicate them.

The first assignment of error is that the district court was without jurisdiction, the term having expired before judgment was rendered. The judgment was rendered, as the record recites, "At a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held for the county of Bernalillo in said district on the first Monday in May, A. D. 1882, being the first day of May, A. D. 1882, and on the 20th day of said term, the same being Tuesday, the 23d day of May, 1882.

See Record, page 6.

As no such question was raised in the supreme court of New Mexico and no such fact appears in the record this court will not notice this assignment. The error must in some way appear on the record.

Storm *vs.* United States, 94 U. S., 76.

This question was not brought to the attention of either of the courts below and cannot be considered here.

Walker *vs.* Sauvinet, 92 U. S., 90.

But it is not a fact that the judgment was rendered in vacation. Section 1865 of Revised Statutes of the United States provides that a district court shall be held in each district at such time and place as may be prescribed by law.

Id. sec., 1873, provides that temporarily and until otherwise provided by law the Governor may fix these times and places by proclamation.

Section 1874 provides that the judges are authorized to hold court in the counties wherein by the laws of the Territory courts have been or may be established for the purpose of hearing all matters and causes except those in which the United States is a party.

Section 1851 provides that the legislative power shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

Under this authority the Legislative Assembly of New Mexico fixed the terms of courts of Bernalillo county in these words:

"The terms of the district courts shall be held in the several counties of this Territory, beginning at the times hereinafter fixed and continuing until adjourned by order of the court, * * * in the county of Bernalillo, on the first Mondays of May and October."

Comp. Laws of N. M., 1884, section 543.

This was a rightful exercise of the legislative power.

Beall *vs.* New Mexico, 16 Wallace, 535.

The record does not show that the court had adjourned; it shows the contrary. Whether it was the district court for

the whole district or the district court for the county the Legislature had fixed its time as above shown.

Second assignment of error.—The note was signed "L. N. Hopkins, Jr," and the declaration described it as signed by L. N. Hopkins. Junior is no part of a man's name, and this is no variance.

Bouvier's Law Dictionary, "junior," and authorities cited.

Kincaid vs Howe 10 Mass 203

Headly *vs.* Shaw, 39 Ills., 354, is a case directly in point.

Johnson *vs.* Ellison, 4 T. B., Munroe, 526.

The evidence shows, too, that the note was presented to the defendant, and he admitted that he owed the debt, and the note was held admissable under the common counts, not under the special count which described the note. The objection, except under the special count, would have to be raised by a plea in abatement.

No proof of signature was necessary. As already pointed out the New Mexico statute makes the failure to deny under oath the execution of an instrument filed as this was an admission of its execution. The oral evidence shows a direct admission of it. See Record pages 12 and 13. The fourth and fifth assignments are fully answered by the opinion of the supreme court of New Mexico, printed with the record and already cited. The sixth exception is frivolous; the remittitur entered in the Territorial supreme court fully covered the defect, and interest as shown by the opinion of the court runs on an account stated from the date on which it is stated.

Nunez vs Daniel 19 Wall 560

The seventh and eighth assignments are already fully answered.

If the evidence would support any court in the declaration it was admissible, and it was offered generally.

Twelfth assignment of error.—It is proper to allow a remittitur.

Section 2190 of the compiled laws of New Mexico provides that "the supreme court in appeals orwrits of error shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."

See The Opinion of the Territorial Court.
Also Kentucky Bank *vs.* Ashley, 2 Peters, 327.

In the last case this court holds that when the record shows that the judgment is excessive, and the amount of the excess, a remittitur may be entered on error even. There certainly can be no question about it on appeal where the court is authorized to enter the correct judgment by statute.

See also Chandler *vs.* Snydam, 22 Vermont, 388.
Weed *vs.* Weed, 25 Conn., 494.
Hart *vs.* Seixas, 21 Wendell, 40.
33 Ohio State Rep., 459.

The court did right in affirming the judgment and rendering it also against the sureties on the appeal bond. This question from New Mexico has been before this court already in two cases, to wit:

Moore *vs.* Huntington, 17 Wallace, 418.
Beall *vs.* New Mexico, 16 Wallace, 535.

The statute quoted in the note at the bottom of page 420 of 17th Wallace, is still in force in New Mexico, and is section 2206 of the compiled laws of 1884.

The judgment where a remittitur is entered is affirmed wholly as to the right of recovery and partially as to the amount, and the sureties on the appeal bond are responsible for the amount as affirmed.

Butt *vs.* Stinger, 4 Cranch C't Reports, 252.
Page *vs.* Johnson, 1 Vermont, 338. D. Cliff
Rush *vs.* Holcyon Steamboat Co., 68 N. C., 72.
Harlett *vs.* Tollman, 30 Ark., 505.
Life Insurance Co. *vs.* Parker, 33 Ohio St., 459.

As to the nature of the undertaking of the sureties, see—
Devlittle *vs.* Dunning, 31 N. Y., 355.
Boylies' Sureties and Guarantors, page 171.

The fact is that the court below should not have disturbed the judgment at all, and its error was against the defendants in error and in favor of the plaintiffs in error.

Plaintiffs in error having failed to raise any question as to excess in the amount of the judgment in his motion for a new trial and arrest of judgment, so that the district court could have corrected the error, if such there was, should not have been permitted to raise it in an appellate court.

Railroad Co. *vs.* Lindsay, 4 Wallace, 650.
"The Vanderbilt," 6 Wallace, 225.
Kennedy *vs.* Johnson, 69 N. C., 249.
Campbell *vs.* Stokes, 2 Wendell, 137.
Mumfort *vs.* M. & C. R. R. Co., 2 Lea, 393.
Beekman *vs.* Frost, 18 Johnson, 544.

The judgment should be affirmed with damages to the defendants in error for the delay they have suffered.

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